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VOL. I.

TRANSCRIPT OF RECORD

UNITED STATES
COURT OF APPEALS

FIFTH CIRCUIT.

No. 16,434

TEXAS PLASTICS, INC., and FRED J. MEYER,

Appellants,

versus

ROTO-LITH, LTD., and HARRY BORAK,

Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(ORIGINAL RECORD RECEIVED DEC. 14/56.)

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CAPTION.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION.

C. A. 940.

ROTO-LITH, LTD., and HARRY BORAK,
Appellee & plaintiff,

versus

TEXAS PLASTICS, INC. and FRED J. MEYER,
Appellant & defendant.

BE IT REMEMBERED: That in the above entitled and numbered cause, lately pending said Court, in which final judgment was rendered at the regular May, 1956, term of said Court, to-wit:

On the 11th day of October, 1956, the Honorable James V. Allred, Judge of the United States District Court for the Southern District of Texas, presiding, the following proceedings were had, to-wit:

APPELLANT'S DESIGNATION OF RECORD.

Filed November 28, 1956.

(Title Omitted.)

To the Clerk of the United States District Court for the Southern District of Texas:

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, Appellants designate the following portions of the record to be contained in the record on appeal in the above entitled action to the United States Court of Appeals for the Fifth Circut:

1. Reporter's Transcript of the evidence and proceedings on the trial, 890 pages, in its original bound form.

2. First Amended Complaint filed May 23, 1955.

3. The Answer of the Defendants filed June 24, 1955.

4. The Court's Pre-trial Docket Order of April 13, 1956.

5. Cost Bond filed by Roto-Lith, Ltd. and Harry Borak, filed April 23, 1956.

6. Cost Bond filed by Texas Plastics, Inc. and Fred J. Meyer, filed April 23, 1956.

7. Motion for Instructed Verdict of each of the Defendants filed May 23, 1956.

8. Verdict of the Jury filed May 26, 1956.

9. Motion for New Trial of each of the Defendants filed June 29, 1956.

10. Order overruling Motions for New Trial filed Nov. 8, 1956.

11. Opinion of the District Court filed October 6, 1956.

12. Remittitur filed by Plaintiffs October 10, 1956.

13. Judgment filed October 11, 1956.

14. Notice of Appeal filed November 9, 1956.

15. Appeal Bond of Fred J. Meyer filed November 9, 1956.

16. Supersedeas Bond of Texas Plastics, Inc. filed November 9, 1956.

17. Order directing that certain specified original Exhibits be sent with the record.

18. This Designation.

19. Any Designation by Appellees of additional matters to be included in the record.

Dated November 27, 1956.

FRED B. WAGNER,
Attorney for Appellants.

P. O. Box 953,
Brownsville, Texas.

COX, WAGNER, ADAMS & WILSON,
Brownsville, Texas.
FISCHER, WOOD, BURNEY & NESBITT,
Driscoll Building,
Corpus Christi, Texas,
Of Counsel.

Service of above Designation accepted and acknowledged this 27th day of November, 1956.

JAMES C. ABBOTT,
Attorney for Appellees.

PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT.

Filed May 23, 1955.

(Title Omitted.)

Comes now, Roto-Lith, Ltd., and Harry Borak, hereinafter called Plaintiffs, complaining of Texas Plastics, Inc., and Fred J. Meyer, hereinafter called Defendants, and for cause of action respectfully show:

I.

That Plaintiff Roto-Lith, is a corporation incorporated under the laws of the State of New York and

Plaintiff Harry Borak is a resident and a citizen of the State of New York, and Defendant Texas Plastics, Inc., is a corporation incorporated under the laws of the State of Texas, with principal place of business at Elsa, Hidalgo County, Texas and Defendant Fred J. Meyer is a resident of McAllen, Hidalgo County, Texas.

II.

That this Court has jurisdiction of this cause because of the diversity of citizenship of Plaintiffs and Defendants. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

III.

That Plaintiffs and Defendants are engaged in the business and occupation of manufacturing and selling plastic bagging and are competitors in such business and occupation.

IV.

That on or about the 5th day of January, 1955, at the city of Pharr, and McAllen, Hidalgo County, Texas, the defendant Fred J. Meyer, acting within the scope of his employment as General Manager of Texas Plastics, Inc., and in the furtherance of his principal's business, maliciously and falsely spoke and published to and in the presence and hearing of Max Lutz, Burton Benson and Edd Boler, the following false and defematory words of and concerning the plaintiffs in respect to the conduct of their business activities, to-wit:

"You have to be careful in buying bags because there are a lot of crooks in the business like Roto-Lith and Harry Borak. You have to watch out for short count, thin gauge and quoting on outside instead of inside dimensions. If you deal with people like that you will wind up paying more to them than you will to me even though my price is a little higher. We had to sue Harry Borak and Roto-Lith for giving a short count on the bags they sold to Mr. Vahlsing. We filed a complaint with the Bureau of Weights and Measures against Roto-Lith and Harry Borak because they violated the regulations and they had to pay a fine.

V.

That on or about the 23rd day of February, 1955, at the city of McAllen, Hidalgo County, Texas, the defendant, Fred J. Meyer, acting within the scope of his employment as General Manager of Texas Plastics, Inc., and in the furtherance of his principal's business, maliciously and falsely spoke and published to and in the presence and hearing of Max Lutz, the following false and defamatory words of and concerning the plaintiffs in respect to their business activities, to-wit:

"You've made a big mistake buying bags from Harry Borak. I've told you he is a crook and that we had to file a suit. I have the proof and I can show you".

VI.

That during the months of January and February, 1955 at the city of Houston, Harris County, Texas and

McAllen, Hidalgo County, Texas, the defendant Fred J. Meyer, acting within the scope of his employment as General Manager of Texas Plastics, Inc., and in the furtherance of his principal's business, maliciously and falsely spoke and published to and in the presence and hearing of Bill Fullick, Bob Blackwell and Dutch Leverman, the following false and defamatory words of and concerning the plaintiffs in respect to the conduct of their business activities, to wit:

"In selling bags for us, you are going to run into some cheap chiselers and crooks like Roto-Lith and Harry Borak who will cheat the customers by giving short count, thin gauge poly and quoting on outside instead of inside dimensions. I have charts which show how they do it. We filed a complaint with the Bureau of Weights and Measures on some bags they sold to us and they had to pay a fine. You can tell your customers that they will wind up paying more to them then they will to us, even if our price is a little higher. We had to sue them and won the case."

VII.

Said slander (as quoted in Paragraphs IV, V and VI) is slander per se. It did, in fact, constitute a defamation by false words vilifying the Plaintiffs in their trade, profession and business, to-wit: Manufacturing and selling plastic bagging.

VIII.

That by reason of the premises, the Plaintiff Roto-Lith, Ltd., has been damaged in the sum of One Hundred and Twenty-Five Thousand Dollars ($125,-

000.00), and by reason of the wilful and malicious acts of the Defendant as aforesaid is entitled to exemplary damages in the sum of One Hundred and Twenty-Five Thousand Dollars ($125,000.00). And that by reason of the premises, the Plaintiff Harry Borak has been damaged in the sum of Seventy-Five Thousand Dollars ($75,000.00), and by reason of the wilful and malicious acts of the Defendant as aforesaid is entitled to exemplary damages in the sum of Seventy-Five Thousand Dollars ($75,000.00).

Wherefore, Plaintiffs pray the Defendants be required to answer herein, and upon hearing that Plaintiffs have judgment in the amounts sued for, costs of suit, and for such further relief to which they may show themselves entitled, in law or in equity.

EWERS, COX & TOOTHAKER,

By JAMES C. ABBOTT,
Attorneys for Plaintiffs.

1630 North Tenth Street,
McAllen, Texas.

I certify that a copy of the above Plaintiff's First Amended Original Complaint has been mailed in a stamped envelope addressed to Cox, Wagner, Adams and Willson, P. O. Box 953, Brownsville, Texas, attorneys for the Defendants.

JAMES C. ABBOTT,
(James C. Abbott),
Of Counsel.

DEFENDANT'S ORIGINAL ANSWER.

Filed June 24, 1955.

(Title Omitted.)

To Said Honorable Court:

Come Now Texas Plastics, Inc. and Fred J. Meyer, Defendants herein, and for answer to Plaintiffs' First Amended Original Complaint say:

I.

They admit the allegations of Paragraphs I, II and III.

II.

With reference to Paragraphs IV, V, VI, VII and VIII, Defendants admit that at the times specified the Defendant Fred J. Meyer was the General Manager of Texas Plastics, Inc. All of the other allegations therein Defendants deny.

III.

Except as hereinabove specifically admitted, the Defendants deny all and singular the allegations of Plaintiffs' Complaint, and they accordingly pray that Plaintiffs take nothing by their suit, and that of their demands, the Defendants go hence with their costs without day.

VI.

In the alternative, Defendants say that should it be found on the trial that the Defendant Fred J. Meyer

made anything like or remarks similar to those alleged in Plaintiffs' Complaint, then each of the remarks were made on a qualifiedly privileged occasion; that the maker of the remark or remarks believed the same to be true, and made them without malice of any sort and on a privileged occasion.

Wherefore, Premises Considered, Defendants pray that Plaintiffs take nothing by their demands, and that of same, these Defendants go hence with their costs without day.

COX, WAGNER, ADAMS & WILSON,
By FRED B. WAGNER,
Of Counsel.
Attorneys for Defendants.

P. O. Box 953,
Brownsville, Texas.

PRE-TRIAL ORDER.

Entered April 13, 1956.

"Pre-trial held. Plaintiff and defendant are ordered to file cost bond within 10 days. Disputed issues: (1) Did defendants slander plaintiffs as alleged; (2) were they true; (3) was there a qualified privilege; (4) amount of damages, if any. Set for May 21st, 1956.
J. V. A."

COST BOND OF ROTO-LITH, INC. AND HARRY BORAK.

Filed April 23, 1956.

(Title Omitted.)

Know All Men by these Presents:

That We, Roto-Lith, Ltd. and Harry Borak, Principals, and Maryland Casualty Company of Baltimore, Maryland, a corporation duly licensed to transact the business of corporate suretyship in the State of Texas, as Surety, do hereby bind ourselves, our heirs, administrators, executors, successors and assigns jointly, severally, and firmly by these presents, that Roto-Lith, Ltd. and Harry Borak, Plaintiffs in the above entitled and numbered cause, will pay all costs that may be adjudged and decreed against them, and each of them, in the above entitled cause.

It is expressly understood and agreed that the liability of the surety herein is limited to the sum of Two Thousand and no/100 ($2,000.00) Dollars.

Witness Our Hands this 21 day of April, 1956.

ROTO-LITH, LTD., and
HARRY BORAK,
By J. C. ABBOTT,
Of EWERS, COX & TOOTHAKER,
Their Attorneys, Principals.
MARYLAND CASUALTY COMPANY,
Of Baltimore, Maryland,
By FRANK E. OSBORN, JR.,
(Seal) Attorney in Fact, Surety.

Taken and Acknowledged Before Me this 21st day of April, A. D., 1956.

PAUL D. MOORE,
(Seal) Notary Public in and for
Hidalgo County, Texas.

Certified Copy.

Know all Men by these Presents:

That Maryland Casualty Company, a corporation created by and existing under the laws of the State of Maryland, of Baltimore City, Maryland, in pursuance of the authority set forth in Section 13 of Article IV of its By-laws, from which the following is a true extract, and which Section has not been amended not rescinded:

"The President or any Vice-President may, by written instrument under the attested corporate seal, appoint attorneys-in-fact with authority to execute bonds, policies, recognizances, stipulations undertakings, or other like instruments on behalf of the Corporation, and may authorize any officer or any such attorney-in-fact to affix the corporate seal thereto," does hereby nominate, constitute and appoint Paul D. Moore and Frank E. Osborn, Jr., each with full power to act alone, of McAllen, State of Texas, its Attorney-in-Fact to make, execute, seal, and deliver on its behalf as Surety, and as its act and deed, any and all bonds, recognizances, stipulations, undertakings, and other like instruments.

Such bonds, recognizances, stipulations, undertakings, or other like instruments shall be binding upon said Company as fully and to all intents and purposes as if such instruments had been duly executed and

acknowledged and delivered by the authorized officers of the Company when duly executed by either one of the aforesaid attorneys in fact.

This instrument revokes powers of attorney granted Paul D. Moore and Frank E. Osborn, Jr., dated February 20, 1946.

In Witness Whereof, Maryland Casualty Company has caused these presents to be executed in its name and on its behalf and its Corporate Seal to be hereunto affixed and attested by its officers thereunto duly authorized, this 16th day of February, 1950, at Baltimore City, Maryland.

Attest:

MARYLAND CASUALTY COMPANY,
(Signed) ROSE E. LUTZ,
Assistant Secretary,
By (Signed) HARRY C. MICHAEL,
Vice-President.

(Corporate Seal)

State of Maryland,
Baltimore City. ss.

On this 16th day of February, A. D., 1950, before the subscriber a Notary Public of the State of Maryland, in and for Baltimore City, duly commissioned and qualified, came Harry C. Michael Vice-President, and Rose E. Lutz Assistant Secretary, of Maryland Casualty Company, to me personally known, and known to be the officers described in, and who executed the preceding instrument; and they each acknowledged the execution of the same; and, being by me duly

sworn, they severally and each for himself deposed and said that they respectively hold the offices in said Corporation as indicated, that the Seal affixed to the preceding instrument is the Corporate Seal of said Corporation, and that the said Corporate Seal, and their signatures as such officers, were duly affixed and subscribed to the said instrument pursuant to all due corporate authorization.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at Baltimore City, the day and year first above written.

(Signed) CLAGETT R. REIMER,
Notary Public.

(Notarial Seal)

My commission expires May 7, 1951.

Certificate.

I, an Assistant Secretary of the Maryland Casualty, Company do hereby certify that I have compared the aforesaid copy of the Power of Attorney with the original now on file among the records of the Home Office of the Company and in my custody, and that the same is a full, true and correct copy, and that the Power of Attorney has not been revoked, amended or abridged, and is now in full force and effect.

Given under my hand as Assistant Secretary, and the Seal of the Company, at Baltimore City, Md., this 21 day of April A. D., 1956.

ROSE E. LUTZ,
(Seal) Assistant Secretary.

COST BOND OF TEXAS PLASTICS, INC. AND FRED J. MEYER.

Filed April 23, 1956.

(Title Omitted.)

Know All Men By These Presents:

That we, Texas Plastics, Inc. and Fred J. Meyer, Principals, and United States Fidelity and Guaranty Company, a Maryland corporation, of Baltimore, Maryland, a corporation duly licensed to transact the business of corporate suretyship in the State of Texas as Surety, do hereby bind ourselves, our heirs, administrators, executors, successors and assigns jointly, severally and firmly by these presents, that Texas Plastics, Inc. and Fred J. Meyer, Defendants in the above entitled cause, will pay all costs that may be adjudged and decreed against them, and each of them in the above entitled cause.

It is expressly understood and agreed that the liability of the surety herein is limited to the sum of Two Thousand and No/100 Dollars.

Witness our hands this 16th day of April, 1956.

TEXAS PLASTICS, INC., and
FRED J. MEYER,
By FRED B. WAGNER,
Of COX, WAGNER, ADAMS & WILSON,
Their Attorneys, Principals.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By FRANK E. OSBORN, JR.,
Attorney in Fact, Surety.

(Seal)

Taken and Acknowledged before me this 16 day of April, 1956.

JOE LUDCLAY,
Notary Public, Cameron County, Texas.

(Seal)

The above and foregoing Cost Bond approved this 20 day of April, 1956.

(S.) JAMES V. ALLRED,
United States District Judge.

In the United States District Court for the Southern District of Texas, Brownsville Division.

Roto-Lith, Ltd., & Harry Borak,
vs. C.A. No. 940.
Texas Plastics, Inc., & Fred J. Meyer.

Appearances:

Counsel for Plaintiffs: Messrs. Ewers, Cox & Toothaker, 1630 No. 10th, McAllen, Texas, by Mr. Wm. E. York and Mr. James C. Abbott, & Mr. Harry Pimstein, 400 Madison Avenue, New York, N. Y.

Counsel for Defendants: Messrs. Cox, Wagner, Adams & Wilson, 849 E. Elizabeth, Brownsville, Texas, by Mr. Fred B. Wagner and Mr. Chas. D. Kennedy.

Be It Remembered that upon the trial of the above styled cause, commenced on the 21st day of May, A. D. 1956, before His Honor. James V. Allred, Judge of

said Court, and a Jury, the following proceedings were had:

Morning Session—May 21, 1956.

(Immediately following the opening of Court, Cause Number 40161 was called for announcements and both sides announced ready, after which the following proceedings were had.)

The Court:
All right, we will get the Jury in that first. It won't take very long, will it?

The U. S. District Attorney:
I don't think so.

The Court:
All right, Civil Action 940, Roto-Lith, Limited, and Harry Borak, vs. Texas Plastics, Inc., and Fred Meyer.

Mr. Abbott:
Plaintiff is ready, Your Honor.

Mr. Wagner:
Defendant is ready, Your Honor.

The Court:
All right, Civil Action 945, United States vs. J. Nelson Parkhill.

(Both sides announced ready, after which the following proceedings were had.)

The Court:
All right. Now, Lady and Gentlemen of the Jury Panel, the first case in which a Jury is to be selected—

The Clerk:
We have one juror to impanel Mr. George.

The Court:
He hasn't been sworn in?

The Clerk:
No, sir, he was excused by mail.

The Court:
How many jurors?

The Clerk:
We have forty one.

The Court:
Forty one?

The Clerk:
Yes, sir.

The Court:
We can get two Juries. Now, Mr. George, will you come around, please, sir?

(Whereupon Mr. H. Garner George was sworn and questioned as to qualification.)

The Court:
All right, you be sworn, sir, as a juror. Now, this will apply to all cases that you might be called on to

be a juror in, this one oath; you won't take any further oath.

(Whereupon Mr. H. Garner George was sworn as a juror.)

The Court:

Now, Mr. George, I think you know what that means, but I will just briefly tell you, it means you are going to try cases here fair and square on the evidence, in the Courtroom, and not something you heard on the outside or might hear on the outside, or some private experience that you might have had or that some of your friends might have had, or your family; that you are not going to be influenced by friendship or maybe because you don't like somebody; I have heard of people who belonged to something that we don't belong to, and don't belong to something that we belong to. Fair and square on the evidence that you hear in the Courtroom, nowhere else, under oath. Thank you, sir.

All right, is the Defendant Zuniga in the Courtroom?

The Clerk:

Yes, sir.

The Court:

Call him around. Now, Ladies and Gentlemen, the first case in which we will get a Jury is the United States against Eugenio Avalos Zuniga. He is charged with having made a—wilfully and falsely representing himself to be a citizen to United States Border Patrol Inspectors and that he knew it was false at the time he made the statement.

(Whereupon the Jury Panel was questioned by the Court regarding Criminal Number 40161.)

The Court:
Thank you very much. You get ten challenges, the Government has six. May I have the file in Civil Action 940? And let me have the docket sheet, too.

Mr. Wagner and Mr. Abbott, will you all come up, please?

(Whereupon a conference was held between the Court and Counsel, at the Court's bench, out of hearing of the reporter.)

The Court:
I am just wondering, how long will this Parkhill case take?

The U. S. District Attorney:
About a half a day, Your Honor.

The Court:
Could you try that this afternoon?

The U. S. District Attorney:
Yes, sir.

The Court:
I believe we had better try that this afternoon—try this case this morning and the Parkhill case this afternoon and get a Jury to come back again in your Roto case in the morning. Try the other one at two o'clock.

The U. S. District Attorney:
If the Court please, I have a witness or two out there in the hall. I would like to know if they are still there.

The Court:
Well, you had better have them come on in, till we get the Jury.

The U. S. District Attorney:
All right, sir.

(Whereupon the names of twelve jurors were called by the Clerk.)

The Court:
All right. Now, you Gentlemen, you will constitute the Jury in this first case we are going to try this morning as soon as we get the Jury in two other cases here. I have got to select two other Juries, so I will excuse you Gentlemen for thirty minutes. Don't discuss the case in the meantime and be back here in thirty minutes.

(Whereupon Counsel in Civil Action 940 approached the Court's bench and conferred with the Court, out of hearing of the reporter and Jury Panel, after which the reporter was called to the Court's bench, where the following proceedings were had, out of hearing of the Jury Panel.)

Mr. Wagner:
Let the record show that at—just before ten this morning, a Jury was selected from the Panel which was a pretty large Panel, about forty or forty one,

—the facts speak for themselves as to what the Panel was.

The Clerk:
Forty one.

Mr. Wagner:
Forty one.—And that after the first Jury was selected, the Court announced he was going to try another case before a Jury, commencing at 2:00 P.M., and try this Roto-Lith against Texas Plastics case starting tomorrow morning at nine. Is that—?

The Court:
9:30.

9:30.—And then advised Counsel that he proposed to select the Jury in the Roto-Lith case from the remainder of the Panel after withdrawing the names of the twelve that were selected to try the first case, and Counsel for the Defendants protested and objected to having to select a Jury from the leavings of the attorneys trying the first case, pointing out that since another Jury was going to try a case at 2:00 P.M. today, they might well select a Jury for that case now and then instruct the entire Panel to come back tomorrow morning, when the Roto-Lith case is to go to trial, so that the Defendant would have an opportunity to select his Jury from an entire Panel and not from those rejected by Counsel in the first case.

The Court:

Let the record show that the motion is overruled, the objection is overruled; that forty one jurors reported this morning, forty of which were in attendance last week, Counsel having been given a copy of the list of jurors—Counsel for the Defendant having been given a copy of the list of jurors early in the week for the trial of a hotly contested criminal case in which Counsel for the Defense was successful; that the Court ordered the Jury Panel to report back on Monday morning, May 21st, forty jurors having reported and one additional juror, to-wit, Mr. George, who had been excused from—last week; out of this Panel of forty one, the Court has selected the Jury in a short criminal case to be tried this morning; the Court is requiring Counsel to select jurors for the trial of the instant case out of the remaining twenty nine jurors and will have the Jury which will try this case report back tomorrow morning at 9:30. All right.

Mr. Wagner:

Your Honor, may I make this inquiry? How many strikes is the Court going to allow?

The Court:

Well, I don't know yet, but—I will have to see.

Mr. Wagner:

Uh huh.

The Court:
It is owing to how many disqualify, if any. All right.

(Whereupon the following proceedings were had in open court.)

The Court:
Ladies and Gentlemen, the next case in which a Jury is to be selected is a civil case, brought by Roto-Lith, Limited, and Harry Borak,—where does Mr. Borak live?

Mr. Abbott:
I didn't hear Your Honor.

The Court:
Where does he live?

Mr. Abbott:
New York City, Your Honor.

The Court:
—against the Texas Plastics, Incorporated, and Fred Meyer—where does Mr. Meyer live?

Mr. York:
McAllen.

The Court:
Where does he live?

Mr. Wagner:
McAllen, sir.

The Court:

McAllen.—for damages for alleged slander, about the conduct of the Plaintiffs' business.

Have any of you heard anything about the facts in the case?

Do you have any opinion, one way or the other, as to the merits of the controversy?

Do any of you know anybody connected with Roto-Lith, Limited? Mr. Borak?

Do any of you know anybody connected with Texas Plastics, Inc.?

All right, your name.

Mr. Garner George:

I am Garner George and I know Mr. Vahlsing.

The Court:

You know who?

Mr. George:

Vahlsing, who is the owner of that big—

The Court:

Have you had any business dealings with him, Mr. George?

Mr. George:

No, sir, other than acquaintance.

The Clerk:

Number 32 on the list.

Mr. Abbott:

I didn't hear him, Your Honor.

Mr. George:
Nothing more than just acquaintance.

The Court:
Anything about that that would influence you in the trial of this case, Mr. George?

Mr. George:
No, sir, I don't know anything about it.

The Court:
All right, any of you know Mr. Meyer, Fred Meyer, Hidalgo County, McAllen?

Now, the Plaintiff in the case, that is, Roto-Lith and Mr. Borak,—They are the people who are bringing this suit, and they are called the Plaintiffs—are represented by the firm of Ewers, Cox and Toothaker, and Mr. James C. Abbott of McAllen and Mr. Bill York of McAllen, are also connected with that firm.

Has that firm of attorneys ever represented any of you or advised you or any member of your family or any company for which you work, so far as you know?

Now, will you rise—let's start out, number—what is the number of this gentleman?

The Clerk:
Mr. Gross.

Mr. James F. Gross.

The Court:
Want to get your number for the lawyers. It is easier that way.

The Clerk:
Number 11 on the list.

The Court:
The firm has represented you or advised you or—

Mr. Gross:
I am a member of the School Board of Pharr-San Juan-Alamo and that firm represents our School Board.

The Court:
Thank you, sir. Would that fact influence you in the trial of this case?

Mr. Gross:
No, sir, it sure wouldn't.

The Court:
All right, Mr.—

The Clerk:
Mr. Gloor is Number 30 on the list.

The Court:
That is the first man in the second row.

The Clerk:
First man in the second row.

Mr. Louis B. Gloor:
I was employed at the Temple Lumber Company up to a matter of six months ago. We had business dealings, they handled loans, closed loans, and so forth. They didn't actually represent me personally at any one time, but the firm I worked for—

The Court:
Would that fact influence you—

Mr. Gloor:
And probably did not exactly—we had business dealings, they just were not employed by us.

The Court:
Would that fact influence you or embarrass you here,—

Mr. Gloor:
No, sir.

The Court:
—to sit as a juror?
All right, Number—what was the next number?

The Clerk:
The next one is Number 36, Mr. Milliken.

Mr. Edwin O. Milliken:
They had merely represented me in several real estate transactions.

The Court:
Would that fact influence you, sir, in this case?

Mr. Milliken:
No.

The Court:
All right.

The Clerk:
The next is Number 40, Mr. Cowley.

Mr. Gerald L. Cowley:
The firm has represented me personally for a number of years. However, they aren't at the present time.

The Court:
Would that fact influence you here or embarrass you?

Mr. Cowley:
No.

The Court:
All right. Now, the Defendant in the case, the people who are being sued, Texas Plastics and Fred Meyer, are represented by Mr. Fred Wagner, of the firm of Cox, Wagner, Adams and Wilson, of Brownsville. Has that firm ever represented any of you or advised you or any member of your family, or any company for which you have worked?

Do any of you have any such social relationships or other relationships with the lawyers in the case on either side that—which might embarrass you or influence you to sit as a juror?

Any questions you would like for me to ask the Jury, Counsel for the Plaintiff?

Mr. Abbott:
Yes, Your Honor, we would like to know if any of the Panel have ever been employed by Fred Vahlsing or any of his associated companies, or if any of their

family had, or if they have done business with him in his various businesses.

The Court:
Fred Vahlsing or any of his companies. Any of you ever been employed by him?

Mr. Joseph Frankie, Jr.:
No, sir. He said if we had done any business with them. I have sold produce to them.

The Court:
That is Number—

The Clerk:
Mr. Frankie, Number 35.

The Court:
Would that fact influence you, sir, here?

Mr. Frankie:
No, sir.

The Court:
Any of you—Any others of you had any dealings with them of any kind or related to anybody connected with Fred Vahlsing or his enterprises?

Mr. Louis B. Gloor:
Again, we have sold them a lot of materials during the days that I was with this other firm—

The Court:
With the Temple—

Mr. Gloor:
—but I—yes, sir, but I didn't meet Mr.—

The Clerk:
Number 30, Mr. Gloor.

Mr. Gloor:
—Vahlsing, personally but—

Mr. Abbott:
I didn't hear the last of that, sir?

Mr. Gloor:
I say I haven't even met Mr. Vahlsing personally, but have sold his firm a lot of materials over the period of years.

The Court:
Would that fact influence you here in the trial of this case?

Mr. Gloor:
No, sir.

The Court:
All right.

Mr. Abbott:
Did the Court inquire if any of the Panel knew Mr. Fred Meyer personally?

The Court:
Yes, I asked them. I suppose they understood me. Do any of you know Mr. Fred Meyer personally?

Mr. Abbott:
And then, of course, as to some of their witnesses, Your Honor, we perhaps want to inquire.

The Court:
Yes. Well, do you want me to inquire about your witnesses, while you are on your feet?

Mr. Abbott:
Yes, sir.

The Court:
Give me their names, please.

Mr. Abbott:
Mr. Burton Benson from Pharr, Texas.

The Court:
What is that first name?

Mr. Abbott:
Burton. B-u-r-t-o-n.

The Court:
Burton Benson from Pharr.

Mr. Abbott:
Yes, sir. Edd Boler, E-d-d B-o-l-e-r, of Pharr. Max Lutz, L-u-t-z, McAllen. Bob Blackwell, B-l-a-c-k-w-e-l-l, Houston. Gerald Levermann, L-e-v-e-r-m-a-n, McAllen. Of course, Mr. Borak. That's all of ours at this time.

The Court:
All right, any of you know Mr. Burton Benson or Mr. Edd Boler of Pharr? Will you rise, please, and let's get the name and the number?

The Clerk:
Mr. Lemon, Number 12, Lawrence C. Lemon.

The Court:
Which one do you know, Mr. Lemon? Both of them?

Mr. Lawrence C. Lemon:
Both of them.

The Court:
Is your acquaintance with them intimate—?

Mr. Lemon:
No, sir.

The Court:
—Or just casual?

Mr. Lemon:
Casual.

The Court:
Would your acquaintanceship with them influence you or embarrass you to sit as a juror in this case?

Mr. Lemon:
None whatever, sir.

The Court:
All right.

The Clerk:
Mr. Elijah S. Hearne, Number 29.

Mr. Elijah S. Hearne:
I am acquainted with Mr. Boler and I sold him some insurance one time.

The Court:
Would that fact influence you here as a juror?

Mr. Hearne:
No, sir.

The Court:
All right.

The Clerk:
Mr. Cowley. Oh, I beg your pardon.

Mrs. Gladys V. Janneck:
Is that the Boler Vegetable and Produce?

The Court:
Is he a produce man, is that the produce man?

Mr. Abbott:
Yes.

Mrs. Janneck:
I don't know him, I just sold him vegetables last year.

The Court:
I beg your pardon?

Mrs. Janneck:
Just sold some produce there last year, but I don't know them personally.

The Court:
She doesn't know him. All right.

The Clerk:
That is Number 33, Mrs. Gladys V. Janneck.

The Court:
Yes, sir. Go ahead.

Mr. Gerald L. Cowley:
I have had dealings with Mr. Benson in the produce business.

The Court:
Would that fact influence you here?

Mr. Cowley:
No, sir.

The Court:
All right. And—

The Clerk:
Number 40, Mr. Cowley.

The Court:
—Mr. Bob Blackwell of Houston, anybody know him?

Mr. Gerald Levermann, of McAllen?

All right, who will be your witnesses, Counsel for the defense?

Mr. Wagner:

If the Court please, I don't know, 'til I hear the Plaintiffs' case, but I have Mr. Donahue and Mr. Dolan from New York, these two gentlemen in front and Mr. Vahlsing sitting here with me, and Mr. Meyer, and probably Mr. Vahlsing's auditor, Mr. Blackwell, the Assistant Manager of Texas Plastics, Mr. Eliasen.

The Court:

How do you spell that?

Mr. Wagner:

E-l-i-a-s-e-n, Eliasen. Oh, and the laboratory man from Harlingen, Pattison's Southwest Laboratory, named Turner, and I might use a man from Mathis named Simpson. Those last ones are not here Your Honor.

The Court:

Well, as far as you know, those will be your witnesses, might be your witnesses?

Mr. Wagner:

Yes.

The Court:

Simpson from Mathis?

Mr. Wagner:

Yes, Tom Simpson.

The Court:
All right. Aside from those who have already—
—do any of you know Mr. Vahlsing?

I believe one juror said he had had a little dealings with the company didn't know him.

Any of you know Mr. Vahlsing?

Mr. Blackwell, the auditor, of Texas Plastics?

Mr. H. Garner George:
Yes, sir, I know him.

The Court,
Mr. George knows him.

Mr. George:
Yes, sir.

The Clerk:
That is Number 42.

The Court:
Would that fact influence you here? He may be a witness and may not.

Mr. George:
No, sir.

The Court:
All right, Mr. Eliasen, the Assistant Manager of Texas Plastics, do any of you know him?
Mr. Turner of the Southwest Laboratory?
Mr. Simpson of Mathis?

All right, any other questions, Counsel for the plaintiff?

Mr. Abbott:
No, Your Honor.

The Court:
Counsel for the defense?

Mr. Wagner:
Your Honor, you asked if any of the jurors have been clients of Ewers, Cox and Toothaker, and I would like for the Court to inquire of the Panel, additionally, whether they have had any business dealings with that firm or any member of the firm, aside from legal representation.

The Court:
All right, any of you, aside from the firm advising you or some company for which you worked, or your family, have any of you had any business dealings with the firm of Ewers, Cox and Toothaker?

Mr. Wagner:
Or any member of that firm.

The Court:
Or any member of it?

Mr. Laurence C. Lemen:
Your Honor, Orville Cox used to be my deputy, my Chief Deputy, in District Court.

The Court:
Would that fact influence you here?

Mr. Lemen:
No, sir.

The Court:
All right.

The Reporter:
What was his name?

The Clerk:
Laurence C. Lemen, Number 12.

Mr. Wagner:
Your Honor, I would like to know if any member of the Panel is a purchaser of polyethylene bags, commonly called plastics bags, I believe, if they are in any business, you know, where they are customers of that kind of—

The Court:
So far as you know, are any of you a purchaser of these bags that he is talking about?

Mr. Wagner:
I would like for the Court to inquire whether any member of the Panel is acquainted with one John Petty, of Weslaco, who, I think, is a barber, at this time.

The Court:
John Petty of Weslaco?

The Clerk:
Mr. Gloor.

The Court:
Just a minute.

The Clerk:
Number 30, Mr. Gloor.

The Court:
What is your acquaintance with him?

Mr. Louis B. Gloor:
I used to come in—I used to stop there and I have know him for—known who he is for twenty years, I suppose.

The Court:
Would that fact influence you here as a juror? I don't know what this connection might be, but he wants to know about it.

Mr. Gloor:
No, sir, sure wouldn't.

The Court:
All right. And—?

The Clerk:
Number 39, Mr. Haas, Julius D. Haas.

The Court:
You may be seated. Mr. Haas?

Mr. Julius D. Haas:
I have known Mr. Petty for quite a number of years.

The Court:
Would that fact influence you in this case, if he is a witness or—?

Mr. Haas:
I don't think so.

The Court:
All right.

Mr. Wagner:
With reference to the two gentlemen who have known Mr. Petty, I would like for the Court to inquire—Mr. Petty, my understanding is, at one time, at least, was a salesman for Roto-Lith, and I would like to inquire whether, in their acquaintance and conversations with Mr. Petty, whether he had any occasion to make any reference to this controversy between Mr. Vahlsing's concern and Roto-Lith.

The Court:
All right. Has he ever said anything to you, Mr Petty, about Roto—?

Unidentified Voice:
No, sir.

The Court:
—or Texas Plastics?

Unidentified Voice:
Neither one, sir.

Mr. Wagner:
That's all, Your Honor. Thank you.

The Court:

All right, I will give you six challenges to the side. that is just double what you are entitled to.

(Whereupon Mr. Wagner addressed the Court in a low tone of voice that could not be understood by the reporter.)

The Court:

No, if you take more than that, more than six you won't have—might not have but eleven jurors. All right.

Mr. Wagner:

May we retire to consider our challenges, Your Honor?

The Court:

All right, you all go ahead and make your challenges.

(Whereupon Counsel retired from the Courtroom.)

The Court:

I am going to take a 15 minute recess at this time and get this Jury at the end of the 15 minutes. Don't discuss this case in the meantime, Ladies and Gentlemen, and, Mr. Marshal, will you get word to those lawyers that I want them to have their cuts in here in 10 minutes, please?

The Marshal:

Yes, sir.

The Court:

Jurors are recessed 15 minutes.

(Whereupon a 15 minute recess was taken.)

The Clerk:

Gentlemen, as your names are called, will you please rise?

Galitzin M. Bogel, Albert Bush, Jr., Dudley Johnson, Ed Reeves, Hubert K. Porter, Henry T. Hartzog, Heraldo Gonzalez, W. T. Sibson, Louis B Gloor, Jose P. Vera, Gladys V. Janneck, Edwin O. Milliken.

The Court:

All right, you, Lady and Gentlemen, will constitute the Jury in this case, and I am going to try to get two other cases out of the way before in the morning. I am going to recess you over until 9:30 in the morning.

Now, do not discuss this case, don't permit anybody to discuss it in your presence, don't walk up to Mr. Alamia, the Clerk, or Mr. Clendening, the Reporter, or to the Marshal, or to any of the attorneys in the case, or any of the witnesses, the parties, and be talking to them about anything, water or anything else. If you want to know anything that arises in the case, there is a question in your mind, wait until you get in that Jury Box over there and say, "Judge, I would like to ask a question." If it is about procedure or something you don't understand, it is all right for you to ask me a question at any time and I will answer it, but it has to be in open Court, in the presence of the parties and the lawyers on both sides.

Now, everybody understand you are to be back in the morning at 9:30, this twelve. You may retire quietly at this time.

(Whereupon the Jury retired and other cases were taken up by the Court, after which Court was recessed until 9:30 A.M., May 22, 1956.)

Morning Session—May 22, 1956.

(A conference between the Court and Counsel was held in the Court's chambers, off the record, after which the following proceedings were had in open Court.)

The Court:

I want to apologize to you all for keeping you waiting, but we have been trying to save you some time, and some matters have come up unexpectedly that neither side, apparently, could anticipate. I am just sorry that we were not able to start earlier. All right. Counsel for Plaintiff may make a brief statement of what you claim about the case.

Mr. Abbott:

Ladies and Gentlemen of the Jury, my name is Jim Abbott. Together with Bill York, we represent Plaintiff Roto-Lith, a New York corporation, and Harry Borak, an individual and citizen of the State of New York, who have brought this suit on an allegation of a slander committed by Texas Plastics Corporation, a Texas corporation, and Fred J. Meyer, the general manager of the corporation, against the Plaintiffs. That is the basis of our cause of action, the slander, according to our pleadings, and our proof

will indicate that these words were spoken in various places throughout the State of Texas, to the Plaintiffs' damage.

The Court:
All right, Counsel for the defense.

Mr. Wagner:
Gentlemen, I am Fred Wagner, of the firm of Cox, Wagner, Adams and Wilson, with offices in Brownsville and Harlingen, and my associate is Mr. Jack Kennedy, of my firm, and it is the Defendants' contention in this case that he didn't say the exact things that the Plaintiff says he did, about him, the Plaintiff, and that the things that he did say about him, he honestly believed were true.

The Court:
Now, wait a minute.

Mr. York:
We renew our motion.

Mr. Wagner,
Well,—and it is our position that the things he said about him were true, and if they weren't true, he honestly believed they were true, and he made the statement to persons who had a right to receive the information that he believed was true about the Plaintiff, that is, it is a qualified privilege, we call it, in law.

The Court:
Now, wait a minute. You say that, first, you didn't say what they say you said?

Mr. Wagner:
That's right, Your Honor.

The Court:
Secondly, that what you did say—

Mr. Wagner:
Was true.

The Court:
—was true, and, third, that if they were not true, what you did say, you honestly believed them to be true.

Mr. Wagner:
Correct, sir.

The Court:
You do not contend, then, the statements that they say you made were true, if—

Mr. Wagner:
Yes.

The Court:
—they establish—if they establish to this Jury's satisfaction, beyond a reasonable doubt, that your client said the things the Plaintiffs say you said, do you contend that they were true?

Mr. Wagner:
Some of them, yes, Your Honor. It is hard for me to answer, because he didn't tell the Jury what he says we said about him.

The Court:
All right.

Mr. Wagner:
But some of the things we said about him, we admit we said about him, and those things, we say, are true.

The Court:
All right.

Mr. Abbott:
Are you ready to proceed, Your Honor?

The Court:
All right, you may have all the witnesses sworn.

Mr. Abbott:
All right, if the Court please, I would like to have Mr. Borak, Mr. Levermann, Mr. Boler, Mr. Blackwell. At the present time, Your Honor, that is all that is in the Courtroom. Would you please rise?

Mr. Wagner:
Mr. Dolan, Mr. Donahue, stand, please. Mr. Meyer, Mr. Vahlsing. That's all that I have in the Courtroom.

The Court:
All right, be sworn.

Mr. Wagner:
I would like to know who—at least that something be done about the other witnesses, so they wouldn't come wandering in.

The Court:

Well, I am going to depend on the attorneys to keep an eye out. Don't let them come into the Courtroom, if the rule is invoked. All of you raise your right hand and be sworn, please.

(Whereupon the witnesses present in the Courtroom were sworn by the Clerk.)

The Court:

All right, whom will you have first, Counsel?

Mr. Abbott:

Your Honor please, the Plaintiff would like to have the rule invoked as to the witnesses, please.

The Court:

All right, whom will you have first?

Mr. Abbott:

Mr. Borak, the Plaintiff.

The Court:

All rignt, the remainder of the witnesses will remain outside the Courtroom. This will not apply, of course, to the Defendant himself, the individual Defendant, Mr. Fred Meyer.

Mr. Wagner:

And Mr. Fred Vahlsing, Jr., is vice-president of the Texas Plastics. Could I have—

The Court:

All right, I will excuse Mr. Fred Vahlsing, Jr. The rest of the witnesses remain outside, don't discuss the

case with anybody except the lawyers in the case. You will talk to them freely. All right.

Mr. Abbott:
Or among themselves.

The Court:
Well, I overlooked that, but—

Mr. Abbott:
Call to the stand Mr. Harry Borak.

HARRY BORAK, having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Abbott:

Q. Would you please state your name, sir?

A. Harry Borak, B-o-r-a-k.

Q. And where do you live?

A. Eleven Fifth Avenue, New York City.

Q. What business are you engaged in, Mr. Borak?

A. Converting and printing of transparent or flexible packaging materials.

Q. Where do you operate this business?

A. At 30-32 West 13th Street, New York City.

Q. And how long have you been engaged in the business?

A. This is our eighteenth year.

Q. Your eighteenth year?

A. That is right.

Q. And what is your position with Roto-Lith?

A. I am president of the corporation.

Q. Would you relate to the Court and the Jury, are you married, and you live in New York City, don't you?

A. I am married. I have a fifteen-year-old daughter at home with us. I have a twenty-year-old daughter who is married. I have a fifteen-month-old grandchild.

Q. Mr. Borak, you state that you have been engaged with Roto-Lith for eighteen years. Prior to that time, what did you do?

A. I was in the coarse or rough wrapping paper business, the Merit Paper Corporation.

Q. Where was that located, sir?

Q. At 110 Clawson Avenue, Brooklyn, New York.

Q. When did you finish school and first start working?

A. I finished school at the age of fourteen. I started working at the age of fourteen.

Q. At eighteen?

A. Fourteen.

Q. And when did you go into business for yourself?

A. At the age of eighteen.

Q. What was that business?

A. The paper business, Pyramid Paper Products Company, at 209 Avenue A, New York City.

Q. Then what did you do after that?

A. After that, the Pyramid Paper Products merged ed with the Merit Paper Corporation and I went to the Merit Paper Corporation.

Q. And you stayed with them until when?

A. I was actively with them until six years ago, until I gave up all connections with them.

Q. And at that time, what did you do?

A. I was in charge of cerain sales for them, devoting as much time to it as I could.

Q. Where is Merit Paper Corporation located?

A. 110 Clawson Avenue, Brooklyn, New York.

Q. While you were still with the Merit Paper Corporation, then, I assume you had already started Roto-Lith?

A. Oh, Roto-Lith was started years prior.

Q. And what function did you have in that corporation?

A. At Roto-Lith?

Q. Yes.

A. Originally, I was the vice-president of the corporation. Four years ago, I was made the president of the corporation.

Q. Would you please enlarge upon the answer to my question with regard to what kind of product the Roto-Lith manufactures, if they do?

A. Roto-Lith manufactures polyethylene bags. We print it. We don't make the polyethylene, we purchase the polyethylene from—majority, the Visking Corporation, of Terre Haute, Indiana, in predetermined size rolls, dependent upon the size bag we are going to manufacture it into. We have three presses. We print four colors at one time, split the rolls apart, bring them to big machines, fabricate them into bags and the basic or the most important use to our volume is the produce industry, carrots, spinach, potatoes, onions.

Q. Now, without going into the technical definition of polyethylene, can you give an illustration of what it is used for, that we may understand, not knowing about it?

A. Well heretofore, the produce people or the shippers or the growers were shipping their products,

such as carrots and other products, in bulk, to their finished market, and carrots would normally be sold in a bunch, by the pound. With the development of polyethylene and its availability, a market was created to clean and wash and cut the tops off the carrots and prepackage them at the sheds, one pound to a printed polyethylene package. The printing had to take place because the laws required that the shipper's name would be imprinted on it so that it would be identified. The polyethylene was on a fabric or a material that was adaptable to keeping the product fresh and it has revolutionized the industry as to waste in the supermarkets where heretofore they would have to throw out many dollars of perishable fruits that were not sold within a certain length of time; they found that the packaging with polyethylene bags, that they could conserve this loss, with the housewife liking going in and buying a pound of spinach clean-washed, so she didn't have to buy this bulk spinach and wash it; the same with carrots, the same with many other produce items.

Q. Now, is polyethylene limited only to produce items or is it utilized in other businesses?

A. Oh, it is utilized in many businesses, sweaters, shirts, boys' underclothng, blankets, sheets, ties, shoe laces.

Q. By that, your mean to furnish a protective covering?

A. A protective covering. They have found—well, as an example, with a man's shirt, heretofore, in selling a man's shirt to the department store, there was a certain amount of spoilage due to dust, the shirt never remained clean, and the covering of this shirt, or the shirt, with the polyethylene bag, enabled them to keep this shirt on the shelf for years, if

necessary, and always present it in a clean fashion so that it would have a resale value at its same price, without being marked down. That is true to almost all of the textiles that it is used for.

Q. Now, I believe you previously stated that you buy the bulk of your polyethylene from the Visking Corporation?

A. We buy all of our polyethylene in sheeting, treated for printing, from the Visking Corporation.

Q. I want you to enlarge upon the polyethylene in sheeting, treated for printing.

A. Well, there were two types of polyethylene. In the finished manner, one is tubing, which is a continuous—well, it is a tube, there is no seams, a ten-inch roll of tubing, or a twelve-inch roll, or a thirty, or eight-inch, whatever size we would want, that we would print it, all we would do, then, in making or forming the bag, make the one seal, because the back seam wasn't necessary, it was already a tube. Sheeting is just the opposite, it is a flat sheet of polyethylene on which we form the back seam and the bottom seam or seal, as you would call it, so that, out of a roll of sheeting, we have, when a finished bag is manufactured, a long seam in the back, running the length of the bag, and a short seal running the width of the bag, where, in a tubular polyethylene, you just have the one seam.

Q. Across the base of the product?

A. Across the base of the bag.

Q. Now, how long has the polyethylene business, if you know, production of it and the converting of it from a blank sheet into printed materials, how long has that business been going on?

A. There, I would guess—I don't know. I would say maybe—the printing of polyethylene, eight or nine

years, but I am guessing, I haven't the exact knowledge.

Q. How long have you been engaged in it?

A. We started in August or September of '53.

The Court:

Fifty what?

A. Fifty Three. 1953.

Q. Now, describe for the Court and Jury the equipment necessary for the converting that we have discussed from a base sheet of polyethylene into a product such as a carrot bag.

A. Well,—

Q. I want you to detail it.

A. Well, we first determine the size of the bag. If the bag is going to be an average bag, four by two by thirteen, which means it is four inches wide, has a two inch gusset on each side, or wo inch pleat, and has thirteen inches of length, we determine the size we will preprint by the width of the gusset, we take four or two by six, because the back is twelve, and allow ourself a half inch or five-eights for the back seam; the printing length of thirteen inches is accomplished by what we call printed cylinders; if seamed, our engraving is on a thirteen and a half—

Q. Now, describe what you mean by engravings, please, at this time.

A. Well, the customer wants a bag called a "John Jones" in a floral design, printed in three or four colors, we will sketch it, have him approve it, then do the art work, make engravings on what we call rubber electrodes,—these rubber electrodes are what we print from—the engravings are put away, the rubber electrodes wear down, we take the engravings out

and draw another set of rubber electrodes; these rubber electrodes are mounted on what we call stock cylinders, which we have in what we call quarter inch steps, which is nine inch up to twenty four inch steps; and if you want a bag fourteen inches long, we would mount this on a fifteen and a half inches diameter cylinder; we control our shrinkage; some put it on thirteen, some on twelve and three-quarter, depending on how much shrinkage they get in running the polyethylene through the press, back to where it is rewound.

Q. Now, when you say shrinkage, is it because of the elasticity in the polyethylene or is it a made shrinkage.

A. No, it is the elasticity, heat, whatever the peculiarities are with your own press; there are certain presses that will shrink more than others.

Q. Then after you have taken the bag around and placed it in your multicolored printing press, it comes out in what form?

A. It comes back on the roll—well, I was telling you now, we would say that a twelve and a half roll, we would print it with the designs across, we would use twenty five inch or twenty five and a quarter, and after it is printed, the four colors, if it is a four color job, it runs through the first color red, the second white, third green, fourth black; that is done in the period of time of seconds, dependent upon the speed that we run. It now goes through a tunnel of hot air.

Q. Is that after each application of color?

A. No, the master tunnel would be after the finish of the fourth color of printing. When it is now through with this ink coverage, it goes to this hot tunnel, which helps oxidize and dry the inks.

The Court:

Counsel, I can't see the materiality of all these details to this case.

Mr. Abbott:

Well, Your Honor, it would be my anticipation to show the materiality. I will try and limit it, however, sir.

Q. And then, going more quickly to the—

A. We would then take this roll and put it on a slitter. A slitter is what we call them. We slit it in the center. We have now two finished rolls of twelve and a half inches apiece. We bring it to the big machine; the printing cylinder being thirteen and a half inch means it is electronically controlled so the design remains constant and every thirteen and a half inch or thirteen and a quarter inches, dependent on how much we shrunk a bag, is delivered out of the bag machine, form sealed, ready for packing, ready to be shipped to whomever the bag is made for.

Q. Now, a bag-making machine, I assume, from what you have stated, is a unit on which you put this roll and in some way it goes through and forms—

A. Forms around a former. If you want a four inch bag, you use a four inch former. If you want an eight inch bag, you take the four inch former out, put an eight inch former in. You determine your cut by arranging for it, arranging an eight and a half inch or scanner or eye, we call it, will help arrange your position of prints.

Q. How do you seal these bags?

A. With heat. A long hot iron will come down on the long seam, the poly is overlapped, and touch it and seals them both together; then, when it goes a

little bit farther around, a rubber drum, it gets the short seal; now goes to work a knife, which cuts it at a predetermined length and delivers the finished bag.

Q. Now, how is that finished bag delivered from the line of transmission through the machine?

A. Through the last end of the big machine, just through the cutting blade, which cuts every thirteen and a half inches or fourteen or sixteen or whatever length bag you make.

Q. And what happens at that time, after you reach the point of termination of the sealing and cutting?

A. Well, at the point of cutting, every time the blade comes down to cut, a counter, which is adjusted and held to the blade, will count, one, two, three, four, five, every time the blade comes down, the counter will register a bag.

Q. Do you have a stacker on the machine?

A. We have a stacker on the machine, which, when a bag comes out, the arm comes over and brings down on the stacker so it can be handled and examined and the operator is not tied down to standing at the delivery end to pull out each bag as it does come out.

The Court:

Counsel, I am just sorry, I can't see the materiality of all these details. What I want to do is try the issues, did the Defendant make these statements, were they true, did the Defendant believe them to be and the amount of damages. I imagine the only theory on which this is coming in would be to show he had a good, established business, or something of that sort, and I am not going to try all the details of making these bags. It is not an infringement suit.

Mr. Abbott:

All right, sir. If the matter should arise later, the Court would permit me to go back into it?

The Court:

Yes. Let's get down now to the issues in this case and maybe have to put you to trial on whether he made the statements and whether they are true and then come back to damages, if we are going to go into a lot of details here.

Q. Now, Mr. Borak, you have stated you went into the business in August or September of 1953, and by that, you meant the polyethylene production?

A. Polyethylene.

Q. Was that operation, when you went into it, what result did you have?

A. Good result.

Q. You mean business-wise?

A. Very good, sir.

Q. Was it profitable or unprofitable?

A. Profitable.

Q. Then, in 1954, did you continue in the production of polyethylene bagging?

A. I did, sir.

Q. And was that operation profitable or unprofitable?

A. It was profitable, sir.

Q. Do you have any information as to what extent of profits you had on that operation?

A. Our Internal Revenue income tax return—

Mr. Wagner:

Now, just a moment. I think I will object to his testimony as to what his income tax return was.

The return itself is the best evidence of what it was.

The Court:
I think that's true. Do you know, in a general way, about the profits of your business?

A. Oh, sure, I know all the figures,

The Court:
All right.

The Court:
A. '54, we made $60,000.00.

The Court:
Net?

A. Yes, Your Honor.

The Court:
'55, you continued the business from then on?
A. We continued, yes, Your Honor. I would use the word "approximately" on that Sixty Thousand. I may be a Thousand Dollars, more or less—
Q. All right, sir, and did you continue in business in 1955?
A. We did, sir.
Q. And what was the result of that operation, if you know?
A. In 1955, we lost approximately $71,000.00.
Q. Mr. Borak, do you know the Defendant, Mr. Fred Meyer?
A. I do, sir.

Q. Are you acquainted with any of the officers or directors of the Texas Plastics, Incorporated, another Defendant?

A. I am, sir.

Q. Who do you know of that corporation?

A. I know Mr. Vahlsing, Junior, Senior.

Q. Can you identify any of those parties that are present?

A. Well, Mr. Vahlsing, Junior, is sitting behind Mr. Meyer, I don't see Mr. Vahlsing, Senior.

Q. When did you first meet the Vahlsings, Mr. Vahlsing and his son, Fred Vahlsing, Junior?

A. 1953.

Q. In 1953. How did that occasion arise?

A. We sold, to the Vahlsing Corporation, polyethylene bags, for the packaging of their produce.

Q. Did you do a small amount of business with them or a substantial amount of business with them?

A. Well, I know how much. We did approximately, the year '53, the last of '53 and the early part of '54, approximately $120,000.00.

Q. When did you meet the Defendant, Fred J. Meyer?

A. Well, before—

Q. All right, go ahead.

A. The early part of '54, I believe.

Q. In the early part of '54?

A. Or the middle of '54. The middle of '54.

Q. Well, what was the occasion for that meeting?

A. Mr. Vahlsing, Junior, had visited at our plant, to see how we printed and made the polyethylene bags, and he told me that there was a thought in his mind that they would like to print and manufacture their own bags, because of the great quantity they used, and would I mind if he brought Senior

up to see our operations. I told him I did not. Mr. Vahlsing, Senior, then came up a few times. Mr. Vahlsing, Junior, they consulted with me and I encouraged them to so do. Through that operation, or their visit with my plant, Mr. Fred Meyer was introduced to me and asked if permission—Mr. Vahlsing asked for permission for Mr. Fred Meyer to have the free run of the plant, to familiarize himself with the problems of printing and converting and bag-making. He explained to me that Mr. Meyer was an engineer and although he had knowledge of the extrusion of poly, or he was going to be involved in it, he had no knowledge of printing or bag-making or what a plant looked like, engravings, how you did it, and I told Mr. Vahlsing, Senior, it would be agreeable to me. Mr. Meyer visited at our plant. Mr. Meyer also brought others to our plant. Mr. Vahlsing, Junior, or Senior, I don't remember, brought Mr.—or maybe it was Mr. Meyer—Mr. Fiffenroth their controller, up to our plant to see how we did this. They consulted with me as to the type bag machines we thought they would need, who we purchased inks from, who made our boxes, who made our engravings, how we arrived at the printing cylinders, how we mounted, and technical, detail information that we had accumulated over a period of fifteen or sixteen years, at that time.

Q. Now, as I understand it, you had been engaged in printing cellophane up to around August or September, '53, more or less exclusively?

A. That's right, sir.

Q. And then you went into the printing of polyethylene and converting it into bags?

A. That is right, sir.

Q. Who did you first do that business with?

A. Well, first customer was Vahlsing, other than just a few thousand bags here or there, our first customer that we became involved with in production was the Vahlsing organization.

Q. You have mentioned the figure of $120,000.00 as the gross amount of business that you probably did or might have done with Mr. Vahlsing in 1953 and 1954. Convert that, if you can, into the number, numerical number of bags that were supplied.

A. Fifteen million bags.

Q. Fifteen million?

A. Figuring $8 a—Well, it is difficult that way because some bags were Seven Seventy Five a thousand, some were Six Seventy Five. I would say fifteen million, sixteen million, fourteen million. I would have to that is the best guess I could make at that. In dollars, I know it was about $120000.00.

Q. Now, this was your first experience in printing and making polyethylene into bags?

A. It was our first mass experience.

Q. What were the problems that confronted you?

A. The amount of production that was needed by the Vahlsing group, the demands and quantities that they wanted.

Q. Now, go into detail on that, please.

A. Well, we weren't set up within an eight hour shift to produce the amount of bags per day that the Vahlsing group were in need of, so we devised a means of sixteen hours to run, and that was not sufficient, we were requested—

Q. When you said "not sufficient," what do you mean?

A. Not sufficient for their needs. We were requested to see what we could do to run around the clock,

when I spoke to Mr. Vahlsing, Senior, about that, because Mr. Vahlsing had told me that of all of the converters that he had purchased bags from, I had the best bag of all of them, and he instructed his son to give me all of the business that I can handle, in fact, buy only from me; then Mr. Vahlsing also told me that he was going to take over the buying himself, to make sure of it, and instead of the orders coming from Warren Street, Mr. Vahlsing, Senior, used to call me from Mathis or Elsa to tell me what he needed.

Q. You are speaking of Mathis or Elsa—?

A. Texas.

Q. All right.

A. I then told Mr. Vahlsing to run twenty four hours a day, not being geared up that way, not having the proper mechanics,—because the shift from twelve at night to eight in the morning was a hurry-scurry shift and what I mean by "hurry-scurry shift" is that qualified mechanical men would not take a job at those hours; I could get a job eight to five or five to one, but having to do that, I head to break men in that knew nothing more than bringing the bag in and packing it, if something happened, they were lost.

Q. Now, at whose insistence did you put on this third shift?

A. On Mr. Vahlsing's insistence, to meet his demands and fill his orders.

Q. Now, you state that you had a personnel problem. getting adequate personnel. Did that create any other problem?

A. No, it created a lot of problems. It created problems to the extent that I told Mr. Vahlsing that running through a night shift of that kind, that I would constitute a delivery of 98% being a good and consistent delivery.

Q. Why did you make such a condition?

A. Bcauese I knew that, running the plant over at night, in the early hours, with men that were not competent, and polyethylene new to us, and the bag machines not even broken in, problems could come up we couldn't take care of, counters could go haywire; if a counter went haywire on one of my employees, he was instructed to run through the night without fixing it, because he wasn't competent to take care of it, make the count by putting it on the scales, a certain number would weigh X pounds, and if he lost the counter, don't shut down, because we needed the twenty thousand bags it would make, fill the box up, bring it to the scale, whatever it weighed, there would be a charge; if it weighed more, take some out, if it weighed less, put some in it.

Q. Who was telling you about this, Mr. Vahlsing, Junior, or Mr. Senior?

A. Well, Mr. Vahlsing, Junior, impressed it on me. Mr. Vahlsing, Senior, is the one discussed, in order to do it that way, I would be 98% short. I was reluctant to do it, because I was not willing to beat my machines up, the machines were not even broken in, it was new equipment that had to be oiled and treated and watched and each machine cost, new, approximately Six or Seven Thousand Dollars; the life of a machine is ten or twelve years, properly taken care of, maybe longer.

The Court:

Now, let's get down to this case. You have shown quite an extensive business. Let's get down to this case. This is not a breach of contract or—

Q. All right, sir, you have related to the Court and Jury that you met the Vahlsings in September, 1953, or started doing busines with them. Thereafter, what did you do in the polyethylene business, disregarding them?

A. Well, we started to go after it, we put in more equipment, built up our production, brought in, that following year, the early part of the year, four more big machines, we joined the Texas Citrus Growers Association as a member, we attended our first show in 1954, the middle of September, or approximately September 21st, at the Baker Hotel in Dallas; we started to insert newspaper advertising in the Packer magazine on a one month schedule; the week before the Packer issue of the convention, we inserted a full pag ad, the back page of the Packer, in color, two columns, telling our story about a pay-as-you-use plan we had; we arranged to take a double space booth at the Baker Hotel, we arranged to bring in, from Fort Worth, Texas, a refrigerated case, we had produce packed in different polyethylene bags in Dallas and exhibited at the show.

Q. What was your purpose of the attendance at that show?

A. To meet the shippers, build up good will and get business, then or future.

Q. What were the results of that meeting?

A. Excellent.

Q. In what respect?

A. We met all the shippers, became friendly with them.

The Court:

Well, I don't want to be interrupting you all the time, but let's get down and try this lawsuit. I can't

see the materiality at this time of all this detail. This is not a suit for unfair competition or breach of contract. I'm sorry, but I want to get along. We can't go into all these minute details this way of his business until its materiality becomes more apparent. I can't see it.

Mr. Abbott:

If the Court will bear with me for two more questions, I will go to the heart of the case.

The Court:

All right.

Q. Now, you stated that you attended the convention and you solicited business. Thereafter, what did you do with respect to following up that goal?

A. Lists were made up of the shippers we met, some mail was written, our factory man was down, our sales manager of the Dallas office was there, he made an appointment with Fred Stone, to meet him in the Valley later; our sales manager, Mr. Robert E. Silverson, took his family down to McAllen and stayed a week or ten days with Mr. Stone, took on all these prospects, men we meet that we entertained with prospect of doing business with,—

Q. And did that business materialize?

A. It did not materialize at that time, they were not ready to purchase and the purchasing was going to be done in a month later or so, but a lot of good will was accomplished.

Q. When did you next come to the Rio Grande Valley?

A. February 10th or 12th of 1955.

Q. 1955. What was the occasion of that visit?

A. I had spoken to Mr. Fred Stone on the telephone as to why we were not getting any business in the Valley. Mr. Fred Stone told me he was going to call me, that he finds it very difficult to do any selling and I better come down, there are a lot of mean stories going around about Roto-Lith and Harry Borak.

Q. And then did you do that, come down?

A. The following morning, I took a plane and went down to the Valley and met Mr. Stone.

Q. And did you discuss this matter with him?

A. I discussed the matter with Mr. Stone. Mr. Stone told me—

Mr. Wagner:

Now, just a moment. We are going to object to testimony as to what Mr. Stone told him if it relates to the matter at issue before this Jury. I don't want to be captious about it,—

The Court:

I sustain the objection.

Mr. Wagner:

—and anything he told him on other things is all right, but—

Mr. Abbott:

I didn't intend to go into that.

Mr. Wagner:

Okay.

Q. As a result of the conversations with Mr. Stone, what did you do?

A. I visited a half a dozen shippers in McAllen, Pharr, and spent the day talking to them.

Q. The purpose of those visits was because of the conversation you had with Mr. Stone?

A. That is right, sir.

Q. Now, I don't want you to relate those discussions that you had with the shippers, but I would like to ask what you next did.

The Court:

He said he talked with the Defendant, didn't he?

Mr. Abbott:

No, sir, he has not yet said that.

The Court:

All right, sir, go ahead.

A. After talking to the shippers, I then went over to see Mr. Fred Meyer at the Texas Plastics Company in Elsa, spent fifteen or twenty minutes there and asked Mr. Fred Meyer to meet me at the Casa De Palmas and have dinner with me, I wanted to speak to him. Mr. Meyer said he would meet me approximately 7:00 o'clock and he did meet me in my room, Mr. Fred Stone, myself and Mr. Fred Meyer.

Q. Now, Mr. Fred Stone, I believe you have indicated, was your Valley salesman?

A. That is right, sir.

Q. And where is he now?

A. Mr. Fred Stone was in an automobile accident, returning from California last year, and he was killed.

Q. Now, present in the hotel room were you, Mr. Stone and Mr. Fred Meyer, the Defendant?

A. That is right, sir.

Q. What did you say to Mr. Meyer on that occasion?

A. I told Mr. Meyer that I had been over to visit Mr. Max Lutz, and "Mr. Max Lutz has told me that you have told him that I was a crook, that my company had business relations with the Vahlsing group, I delivered short bags to them, I was fined by the Bureau of Weights and Measures," and that Mr. Vahlsing had to sue me to get back the money that he was entitled to. I told him I went over to Mr. Edd Boler and Mr. Boler was cordial to me, we went over to the Texas Hotel for a cup of coffee, I asked Mr. Boler—

Q. Now, just a moment, sir.

Mr. Wagner:

Now, wait—yes.

Q. I would like you to limit what you said to Mr. Meyer; he is one of the parties defendant. I don't want you to tell me what Mr. Boler told you.

A. Mr. Boler—you don't want me to tell you what Mr. Boler—Oh, what I told Mr. Meyer? I told Mr. Meyer that Boler had told me that he was into the shed—

Mr. Wagner:

Now, just a moment. I will ask the Court to instruct the Jury that this, of course, is hearsay as to what Mr. Boler said and that it is offered here because it was so stated to the Defendant, that it is not evidence of the fact, if it is a fact that Meyer

made the statement to Boler that this man challenged him with having made.

The Court:

I overrule the motion for instruction and I will admit the evidence of what this man says he said to the Defendant, Meyer.

Mr. Abbott:

Your Honor, we offer to prove—

The Court:

I understand. I have ruled.

A. I told Mr. Meyer that Mr. Boler had told me that he called me a crook. "If you do business with Mr. Borak, his price may be a few pennies less, but in the end, it will cost you more. I have got the proof. It was me who got money back for Vahlsing from Roto-Lith because I proved that they were crooks. I had them fined. The Bureau of Weights and Measures fined them besides, and whatever you buy from them at, no matter what price, it will cost you more in the end because he will steal from you."

Q. You related that conversation to Mr. Meyer?

A. To Mr. Meyer.

Q. And then what happened?

A. I then told them that Mr. Burt Benson had told me that "you were in to see him and told him that if he ever did business with Borak and Roto-Lith, that he would be gypped, that they deliver thin quality bags, seams are open, there is no holes in them," and that—

Mr. Wagner:

Now, just a moment, Your Honor. I am going to object to this again and again request the Court to instruct the Jury that this hearsay is not admissible on the issue of whether the statements were made or not and they are only admissible because made to the Defendant for his reaction or statement, whatever statement this man is going to testify to.

The Court:

Overrule the motion.

Mr. Wagner:

All right. Then, additionally, Your Honor, this is not the charge in the pleadings.

The Court:

I don't care to hear any argument on it at this time, Counsel. I don't care to hear any argument on it.

Mr. Wagner:

Well,—

The Court:

All right.

Q. All-right, then, what did you say to Mr. Meyer?

A. Then Mr. Meyer said to me, "Harry, it was stupid of me. I lied. I thought it would help me in my selling. I realize I made a mistake. I will never, never do it again, I promise you. It was the stupidest thing I have ever done, to lie the way I did." He offered me his hand. I shook hands with him and said, "Fred, I believe you. You will never say it again."

We went to Reynosa, had dinner, we spent a pleasant evening, I felt that that was the best way to handle it.

Q. Did you—were you brutal or rough in your treatment of Mr. Myer?

A. No, my sole purpose then was not to create any odor about this thing and that if I could nip it in the bud, I was better off, so I was gentle with him to the extent that I didn't want any anger. I accused him; he apologized; he admitted he lied; he would never say it again. I was satisfied.

Q. And you did relate to him the basis upon which you were making the statements to him?

A. I did, sir.

Q. Then what happened after that?

A. The following day, I left for Corpus Christi. The following day, I went in to see Mr. Max Lutz, who gave me an order for three million polyethylene bags; I then left for Corpus Christi, Houston, stopped at my Dallas office, arrived back home at one o'clock in the morning with a frantic message from Mrs. Borak that Mr. Fred Stone has called you and wants you to call him no matter what time you come home.

Q. Did you call Mr. Stone?

A. I called Mr. Stone. Mr. Stone said that Mr. Lutz had—

Q. Just a moment. I don't want you to relate that conversation. I want to know, now, what you did in response to that phone call that you had from Mr. Lutz.

A. After getting through talking to Mr. Stone, I called Mr. Lutz from the office the following morning.

Q. And then what did you do after—did you talk to Mr. Lutz?

A. I spoke to Mr. Lutz and Mr. Lutz wanted to cancel the order that he had given to me. Mr. Myers had been in to see him.

Mr. Wagner:
Just a moment. We will object to that and ask the Jury—

The Court:
All right,—

Mr. Wagner:
—be instructed—

The Court:
—I sustain the objection.

Q. You may tell what—he wanted to cancel the order, but not what he told you about anything else. What did you do as a result of that conversation with Mr. Lutz?

A. I put fourteen telephone calls through to Mr. Vahlsing, Sr., at Elsa, Mathis and Corpus.

Q. Where were you at the time?

A. New York City.

Q. And what happened?

A. He would not speak to me.

Q. And then what did you do?

A. I called my attorney, Mr. Edward Joseph, and told him—well, may I tell him—say now what Mr. Lutz told me, or just that I called him?

Q. Just that you called him.

A. I called Mr. Edward Joseph; I related to him what was told to me, and because of that conversation, he called a Mr. Petchesky, who was an attorney

for the Vahlsing group. He explained to them what had happened after Mr. Borak had left the Valley and received certain promises and that the same thing happened the following day when he left; that he—

Q. Now, when you say "certain promises," you had left the Valley, you had promises from whom?

A. From Fred Myer, that he would never say it again.

Q. And then what did you tell—what was the next thing that happened? Did you inform Mr. Petchesky of this?

A. Mr. Joseph informed Mr. Petchesky of this and he asked Mr. Petchesky to have Mr. Vahlsing call Mr. Lutz and deny to him that I was ever sued, that I was ever fined, that I was a crook.

Q. Was that what you were seeking, was a denial to Mr. Lutz?

A. We were seeking for Mr. Vahlsing to call Mr. Lutz because I had told Mr. Lutz that these stories were not true and that I would have Mr. Vahlsing call him and deny them and if he felt any way at all timid about the order, that he would be cheated, even though the order was signed and it was twenty five or thirty thousand dollars, on one word from him, I would tear the order up, that I didn't want to have any business relationship with him if he were skeptical. I promised him that I would have Mr. Vahlsing call him and deny that these were true stories.

Q. And then what happened?

A. The following day, I was very sick about this, I had not heard from Mr. Joseph as to getting a call back from Mr. Petchesky, so I called Mr. Joseph at four o'clock, Mr. Joseph was not in, I took upon myself to call Mr. Petchesky to ask if he had heard from Mr. Vahlsing.

Q. What was the urgency of your calling?

A. Well, I was sick about this. This whole thing had collapsed on me, as to me now having had a conversation with Mr. Myer where he swore to me that he would never say it again, and the following day, he repeated worse, and the whole thing had to be stopped.

Mr. Wagner:

Now, just a moment. We will object to his statement—

The Court:

Yes, I will sustain the objection.

Mr. Wagner:

—that the following day—he couldn't know.

The Court:

Don't consider the statement "The following day he had made worse statements," for the reason that it is hearsay as to the defendants.

Q. Well, I will ask you to describe what the urgency was in—

A. Well, I had promised Mr. Lutz that Mr. Vahlsing would, in the same day, would call him and deny the story, and here it was two days later and Mr. Lutz was waiting for the call, so I called Mr. Petchesky. He says, "Yes, Harry, I spoke to Mr. Vahlsing. Mr. Vahlsing informs me that he has discussed this—"

Mr. Wagner:

Just a moment. We except to this because it is obviously hearsay.

The Court:
Yes.

Mr. Wagner:
He doesn't know what was said.

The Court:
I sustain the objection as to what he told his attorney. I will let him tell anything Mr. Vahlsing said to him.

Mr. Abbott:
Your Honor, I thought perhaps it would be admissible on the ground that Mr. Petchesky is the Vahlsing attorney and this conversation was had with him. If I am in error, I will withdraw the question.

The Court:
I didn't realize that you had proved that he was his attorney, but I think I will sustain the objection of the attorney. I will let him tell what he says Mr. Vahlsing said to him, the witness.

Mr. Abbott: —
Well,—

The Court:
It may later come in anyway. I imagine all this will come in, both sides are going to throw down the bars after while, but I will have to sustain the objection at this time.

Q. You did have a telephone conversation with Mr. Petchesky?
A. That's right, sir.

Q. To your knowledge, was an apology ever given to Mr. Max Lutz, by Mr. Vahlsing?

A. It was never given to him. He refused.

Q. Did you later talk to Mr. Fred Vahlsing, Sr., about this?

A. I did, sir.

Q. Relate that conversation, please.

A. I called Mr. Vahlsing in Corpus; I didn't understand why he was doing this to me, that I had done nothing but help him, that I was a friend of his and I had shown it to be, that our relationship was cordial, that we never had any trouble, we may have had little business troubles but we have always shook hands about it, he called me Harry, I called him Senior, and would I ask him to apologize and tell a man that something wasn't true if it had not been said, and he said, "I don't want to have any part of it." I told him that I would have to have him now insert in the Packer a retraction of these lies. He refused to do it.

Q. Did he give you any reason for his refusal?

A. He said that he had discussed it with Fred Meyer and Fred Meyer denies that he ever said one word about Roto-Lith in any manner whatsoever and therefore he would retract nothing.

Q. Did you tell Mr. Vahlsing about your conversation with Mr. Meyer?

A. I told Mr. Vahlsing that how could he say he had never said it when he apologized to me for lying at the hotel, in front of Fred Stone, and admitted it to me.

Q. And what did Mr. Vahlsing say?

A. "Well, he denies it and I won't do anything."

Mr. Abbott:

Your Honor, at this time I would like to pass the witness and would request the indulgence of the Court for one minute while I walk out the door.

(Whereupon Mr. Abbott retired from the Courtroom briefly; upon his return, the following proceedings were had.)

Q. All right, you may proceed with your cross examination.

Cross Examination.

By Mr. Wagner:

Q. Mr. Borak, in about August of 1954, you had invoices unpaid with Mr. Vahlsing's organization of approximately $23,000.00, didn't you?

A. That is right, sir. Twenty one thousand, I think it was.

Q. Twenty one thousand?

A. Yes, sir.

The Court:

You mean that Vahlsing's organization owed him that?

Mr. Wagner:

That's right, sir.

The Court:

Well, all right.

Mr. Wagner:

Well, I didn't put it that way.

The Court:

I know you didn't. I am trying to understand what happened.

Mr. Wagner:

He was claiming twenty one thousand from the Vahlsing organization.

Q. And do you recall going to their offices at Warren Street, that you mentioned a moment ago, about the orders not having come from Warren Street, that is where the Vahlsing organization's main offices are, are they not?

A. I have been there many times, sir.

Q. Do you recall going there in August of 1954 and having a conversation with Vahlsing, Jr., Fred Vahlsing, Jr., and asking him to make you an advance of about $10,000.00 or pay you $10,000.00 on your outstanding unpaid invoices?

A. Well, I can only say this, sir, I have asked him a dozen times on the telephone, at his office,—

Q. And on the occasion that I am speaking of, Mr. Vahlsing, Jr., told you that a shortage had developed in their inventory in Texas, their bag inventory, of approximately $13,000.00?

A. That is not true, sir.

Q. Didn't he say anything to you about an inventory shortage? Do you deny any reference to it or is it just—

A. From Vahlsing, Jr., I do.

Q. Well, did someone in the Vahlsing—you say you deny that Vahlsing, Jr., told you that. Well, who did tell you that?

A. When I visited with them, Vahlsing, Sr., was there with Junior, and Vahlsing, Sr., told me that. That is my recollection.

The Court:

Vahlsing, Sr., told you what?

A. Vahlsing, Sr., told me that they developed the shortage at the Elsa shed of approximately a million bags, around seven or eight thousand dollars, and he wanted to deduct it from the $21,000.00 that he owed me. The confusion of Vahlsing Sr. and Jr. is such that—that was what was said to me,—

Q. Well, that is all right.

A. —but in the excitement, it may have been Junior. I believe it was Senior.

Q. All right, sir, in any event, in your recollection, it was seven or eight thousand dollars?

A. He mentioned one million bags and he wanted to give $21,000.00 less $7,000.00, $14,000.00.

Q. And do you recall coming back the next morning—let me put it this way, perhaps this will refresh your recollection; you had a note to pay, or some obligation, and you were insistent on getting $10,000.00, at least, do you recall that?

A. I have never had a note to pay that could not be met. I have used the practice of trying to get the people that owed me money to give me money by saying that I had bills to pay, I had a note to pay, I wanted money.

Q. Well, you don't recall any instance in which you asked him for $10,000.00?

A. Oh, yes, I state to you this, sir, that I have, in many instances, gone to customers that owed us great sums of money and said to them, "I have a note due tomorrow morning at nine o'clock; I have got to have money; you owe it to me; why don't you give it to me? I am in trouble; I have got to pay the bank." It was a means of having accounts that are very slow that owed me money for five or six months, to

make them feel as though "Well, gee, let's give Borak a chance." I have used that method of trying for collections and I have said the same thing to Vahlsing many times, that I have got notes to pay, obligations, commitments, "You have got to pay, I won't make bags for you if you don't give me money. I will send a girl down to get the check. I won't make bags for you."

Mr. Wagner:

Now, Your Honor,—

A. This is going back to the year prior, where I discussed with Junior that unless he gave me money, I would not work for him any more, telegrams from—

The Court:

That's enough. That's enough. Now, just answer the questions.

Q. Now, just follow me here. And at the time of the conversation I am talking about, when you wanted $10,000.00 on your $21,000.00 invoices,—

A. I wanted $21,000.00, sir.

Q. All right, let's put it that way, then. Isn't it a fact that Vahlsing Sr. wasn't in town and Mr. Vahlsing Jr. told you that he would contact his father with reference to making you an advance of $10,000.00 on these invoices because they were checking your deliveries to see if that had anything to do with this shortage that had developed in their inventory? Don't you recall him telling you that?

A. My recollection is that Vahlsing Sr. was the first one that ever mentioned anything to me about a shortage, when I started to press him for the payment of the money, it was the first time I ever heard

of it, was when Vahlsing Sr.—and I may be confused there because there were many conversations—I believe it was Vahlsing Sr. that told me about it. It may have been Junior. I believe it was Senior.

Q. All right, but—and didn't he further tell you later that they would make a payment of $10,000.00 on your invoices if you would sign an agreement that whatever the Bureau of Weights and Measures found with reference to your bags, if they found your boxes short, if you would make an agreement with them, that whatever shortage they found, if they found a shortage, you would apply to your entire sales to them, they would make you this advance of $10,000.00?

A. May I answer that in my own way, sir?

Q. No, not yet.

A. Well, it is not true.

Q. Not yet. It is not true?

A. It is not true.

Q. You did know that Vahlsing was having the Bureau of Weights and Measures check your boxes, did you not?

A. That was much after the conversation where I wanted my money paid from him. You are relating now to where he told me he was short a million bags at the shed and he wanted $7,000.00. What you are saying now about the Bureau of Weights and Measures took place after that.

Q. All right. You knew that Mr. Vahlsing did make a complaint to the Bureau of Weights and Measures in New York, did you not?

A. I knew that later, sir, yes, I did.

Q. All right, and that they were checking your boxes?

A. I didn't know what they were doing.

Q. Well, let me ask—

Mr. Abbott:
Your Honor, please,—

Mr. Wagner:
Go ahead.

Mr. Abbott:
I would like to object to any interrogation relating to the investigation of the Bureau of Weights and Measures of the city of New York unless it is shown that that Bureau had authority to intercept interstate shipments and make an investigation, I think it is irrelevant and immaterial, incompetent testimony, until that is shown.

The Court:
Overruled.

Q. Didn't Mr. Meyer come to you after the Bureau started that investigation and request you to go with him to the Bureau to see the investigation they were conducting as to whether your boxes were short or not?

A. That is not true, sir.

Q. And didn't you refuse to go?

A. That is not true. I asked and requested that I be present.

Q. All right, and didn't you take the position that "I have no responsibility for those cartons after they leave my plant"?

A. Again, I must answer that with conversation that took place, to why I said it. I did say that, but there was a reason why I had said it.

Q. All right.

A. May I give you the reason?

Q. Your lawyer will get a chance to take you in just a minute, to explain that. I am trying to see what you say about these things. These bags are put up in corrugated paper cartons, are they not?

A. Corrugated cartons.

Q. And they are sealed at every seam, with about two inch gummed tape?

A. Only on the top and on both sides.

Q. Uh huh.

A. Not on the bottom.

Q. Uh huh. And they were packaged in different size cartons, some of them will have fifteen hundred bags to the carton, will they not?

A. Dependent upon the size of the bag and size of the carton we use.

Q. Some of them will have as much as five thousand bags in a carton?

A. A small bag would, yes, sir.

Q. And these cartons were about the size or probably a little bigger than an ordinary bottled beer carton, just so the Jury will have some general idea?

A. Well, the size of the carton would be fifteen inches long, fifteen and a half inches wide, twelve inches deep, and we had smaller ones, we had bigger ones.

Q. Now, coming back to your last efforts, now, to get payment from the Vahlsings, which is—I am correct in saying that it was in August, am I not?

A. I believe you are right, sir.

Q. And you had a conversation with Mr. Vahlsing Junior one evening and didn't—one day, and didn't you come back the next morning, early in the morning, now, about 8:45—about 8:45, 8:30 or 8:40 the next morning, wasn't that the last time you tried to get payment?

A. Sir, I have been to the Vahlsings' office on Warren Street during the month of July—June, July and August, so many times, to try and get the money that was due me, that I have no recollection of a particular morning.

Q. Well, now, wait just a minute—

A. I was there many, many, many times.

Q. I can understand that, of course you couldn't remember them all, but you remember the last one, don't you? Wasn't there anything un—

A. The last time I was to the Vahlsings' office was a conversation that took place with Senior when I walked out of the office and I never returned.

Q. With Vahlsing Senior?

A. That's right, sir, and a Mr. Saul Segal, who was with me.

Q. And Vahlsing, Junior, was there, wasn't he?

A. No, he was not. Mr. Vahlsing Senior was talking with me in front of Mr. Saul Segal. Mr. Vahlsing—shall I go on with the conversation?

Q. No, let me ask you if this isn't what happened on the morning of that last meeting, didn't Mr. Vahlsing Junior tell you that he had talked to his father on the telephone the night before and that his father had authorized him to pay one half of your outstanding invoices provided you would agree to apply any shortage found by the Bureau of Weights and Measures to all of your invoices to him, those that had been paid before?

A. The offer that was made to me was Mr. Vahlsing Senior to take $7,000.00 off the bill and he would give me my money, which I refused. I told Mr. Vahlsing Senior that how in the world could he come to me eight months later, after buying from six different converters, and tell me that I—because

of me, he has got a shortage at the shed, where I didn't even have any bags left there. He then wanted to take $4,000.00 off. The reason that I am so sure that that was my last visit was that then Mr. Vahlsing Senior called me a crook, and, with that, I walked out of the office and never returned.

Q. That's what I am getting to. Didn't you go—leave the office in which you were talking to one of the officers of the Vahlsing group, whether it was Senior or Junior, and didn't you go to another office to determine the exact amount of the outstanding invoices because they were going to pay you half of them? Didn't you do that?

A. I don't understand about paying me half. I wouldn't take $14,000.00, which was what he wanted to give me.

Q. I understand.

A. He wanted to give me—

Q. I understand.

A. He wanted to give me $17,000.00 and I wouldn't take it.

Q. Now, just a moment, Mr. Borak. I don't mean to imply that they were going to give you half in complete payment of your outstanding invoices,—

A. I'm sorry, sir, I thought that was—

Q. —but isn't it so that you were using the—whether it was an excuse or what it was, you told us you frequently used the statement you had a note to meet and needed some money—didn't they finally say, "Well, we will give you half of the amount of your outstanding invoices and not wait for a determination by the Bureau as to whether there is a shortage in your boxes or not," and you went to the bookkeeper to find out the exact amount of the outstanding unpaid invoices—

A. Sir, I knew the exact amount of the unpaid invoices for the last three months; why go to their books?

Q. Well, that's all right. What I want you—

A. Well, I wouldn't go for that reason because I had been for three months trying to collect $21,000.00. I didn't have to go to their books to find out what they owed me. I had statements.

Q. All right, and didn't you come back into the office, regardless of whether it was Junior or Senior, now, and you grew very angry and said, "No matter what happens to me, I will make you the most sorry man in the world"?

A. It's language I have never used, sir.

Q. All right, you deny that you said that?

A. I don't deny that I have said it. I was angry, because I was now being held up for a fictitious allowance, the first time I ever heard of it, and I was angry, I may have said something about "You will be sorry for this, sir. It is not a right way of doing business." I may have said something like that, because I was angry.

Mr. Wagner:

Would you mark this, please?

(Whereupon Defendant's Exhibit No. 1 was marked for identification.)

Q. Before this occasion, in August, now, you had already had a hearing—withdraw that. Isn't it a fact that—what is the date of that violation stuff? Isn't it a fact that on August the 17th—that is just about the same time, I believe, wasn't it? Well, le me put it this way.

A. As to any last meeting with Vahlsing?

Q. No, no. The Bureau of Weights and Measures served what they called a violation on you, did they not?

A. They did not. I refused to accept the service of it.

Q. That's right, you got very mad and wouldn't—they wanted you to sign a letter or a ticket that you acknowledged receipt of this notice—

A. Well, I didn't know what they wanted me to do but I refused to accept the service of a summons without knowing what it is about and where it was and who counted it and what was there.

Q. All right. Now, while we are there, a man of the Bureau of Weights and Measures, named Mr. Dolan, who is here as a witness, and another inspector of that service, called on you and wanted to serve on you a notice of an alleged violation in count, did he not?

A. You are wrong again, sir, he wanted to serve two violations on me.

Q. Well, all right, two violations.

A. That is right, sir.

Q. And he requested you to sign the place on the bottom acknowledging receipt of the notice did he not?

Mr. Abbott:

Your Honor please, I would suggest that the notice itself, if they have it, would be the best evidence of what they were trying to get him to sign.

Mr. Wagner:

This is cross examination—

The Court:
Overruled.

Mr. Wagner:
—and it will be here.

The Court:
Overruled. I will rule on it.

Mr. Wagner:
Excuse me, Your Honor.

The Court:
I will rule on it, hereafter, you need not argue it with him.

Mr. Wagner:
Excuse me.

The Court:
All right.

Q. And you grew very angry with those men, did you not?

A. Sir, I was angry, and—

Q. Well, you can explain it later, for your counsel. You did get very angry?

A. I became angry over the way the man walked in with the two summonses and what he said, I became angry.

Q. And you told them, "You have no right to come into my office and accuse me of cheating and stealing"?

A. I believe I most certainly said that, sir.

Q. And just about that time, you then, after that date, after they served that notice on you, then you devised the idea of filing a libel suit for a million dollars against Vahlsing, didn't you?

A. The libel suit against Vahlsing was filed or given to my attorney before the summons was brought up to me.

Q. You are sure about that?

A. I am very positive.

Q. Well, I will hand you these documents that have been marked D-1 and ask you what they are.

A. This is a summons for Harry Borak and Roto-Lith against Frederick Vahlsing, Senior, Junior, and F. H. Vahlsing, Inc.

Q. And what date was that summons issued?

A. The date of the summons was issued—

Mr. Abbott:

Your Honor please,—

Mr. Wagner:

Just a moment. I withdraw the question. I withdraw the question. That is a copy of the complaint you filed in New York against the Vahlsings, for libel.

Mr. Abbott:

Your Honor please, I see no materiality to this inquiry as to what happened in New York at that time. The issue before us is whether these words were said, not whether a lawsuit was filed in New York or not.

The Court:

I will overrule the objection. I don't—it deals with deeds and controversies between them that you

brought out on—went into on direct examination. I will overrule the objections.

Q. That is a copy of the complaint you filed?

A. The—well, as I know a complaint, this is the action taken against Vahlsing by Harry Borak and Roto-Lith, was given to my attorneys on August the 14th.

Q. Well, now, Mr. Borak, please answer my question, won't you, sir?

A. Yes, sir.

Q. That is a copy of the complaint that you filed against them?

A. That is right, sir.

Mr. Wagner:

Thank you. We will offer D-1 (passing instrument to counsel). While he is examining—may I ask him some other questions, Counsel?

Mr. Abbott:

No, let me see it, please.

Mr. Wagner:

All right, sir.

Mr. Abbott:

Your Honor please, I object to the admissibility of this document—

The Court:

Let me see it.

Mr. Abbott:

—on the basis that I did not go into this controversy on direct examination and it doesn't pertain to the

issue in this case and that it is immaterial to any issue in this case.

The Court:

I overrule the objecton. I think it is admissible as affecting the interests, showing the general course of dealings between the parties. I will overrule the objection.

Mr. Abbott:

Your Honor, we have an exception to that?

The Court:

Yes, sir.

Q. Now, Mr. Borak, that libel suit you filed on August 19th, you settled that about two weeks later, didn't you, with Vahlsing?

A. I would say that we settled it within two or three or four weeks. I don't remember. We settled it.

Q. You had outstanding your invoices of $21,000.00 and this damage suit against them for libel and you settled the entire matter?

A. We settled the entire matter, is right.

Q. You dismissed your libel suit and they paid you $17,565.00, did they not?

A. Well, I would say—

Mr. York:

May it please the Court, representatives of the corporation are sitting here grimacing and making gestures and one thing and another.

The Court:

Yes, I have been noticing that heretofore,—

Mr. Wagner:
Let's don't—

The Court:
I have been noticing the grimacing and shaking of the head and so forth. Now, I am going to put you out of the Courtroom if you don't stop it, both of you.

Mr. Fred Vahlsing, Junior:
I am sorry, Your Honor.

Q. They paid you $17,565.00, didn't they?
A. That is right, sir.
Q. And you dismissed your libel suit?
A. That is right, sir.

Mr. Wagner:
Judge, I wanted to read this to the Jury. Shall we do it now or—I want to show the nature of the charges that he made against them in that libel suit.

The Court:
All right.

Mr. Abbott:
We renew our objection, Your Honor.

The Court:
All right.

Mr. Wagner:
Now, I am not going to read the summons, gentlemen,—

The Court:

I want to say this in connection with it, I am glad they settled their lawsuit. The law encourages settlement and people can buy their peace, sometimes, and avoid costs of litigation and so forth, why, they settle cases. I let it in for the purpose of affecting Mr.—this witness' credibility, if it does, and not that he has testified to anything to the contrary here, but it might reflect on his interest and want of interest and things of that sort, in the outcome of this case, the credibility of the witness, the weight to be given to his testimony. All right.

Mr. Wagner:

"Supreme Court of the State of New York, County of New York. Harry Borak—"

The Court:

They call their trial Court up in New York, as I understand it, gentlemen, the Supreme Court, where we call ours the District Court here.

Mr. Wagner (Reading Defendant's Exhibit No. 1 to the Jury):

Q. Now I noticed in there that the alleged reference to shortage mentions 13,000 bags. There never was any 13,000 bags; that is no significant sum of money, is it?

A. Thirteen thousand bags, I believe, was a typographical error. Thirteen thousand bags would be $120.00.

Q. Yes. What you meant to claim was $13,000.00 short?

A. No, sir, I think it was meant a million three hundred thousand bags.

Q. All right. And you told us just a moment ago that you had already placed this complaint—the instructions with your attorney to file this suit on August the 14th?

A. Well, as I say, you are going back two and a half or three years.

Q. All right, you are mistaken about that, aren't you?

A. I don't know; the dates from August 14th to August 18th, three years ago, are pretty close.

Q. I know they are pretty close, but in series of events, isn't this what happened,—

A. It was, to my knowledge, that when I received the summons from—the two summonses from the Bureau of Weights and Measures, that this had already been in the lawyer's hands.

Q. Well, aren't you mistaken about that, because isn't it a fact that the summons was served on you on August the 17th?

A. I don't know.

Q. And you don't even claim—I mean the information you gave your attorney at that time, you did know the dates then, didn't you, because this complaint—

A. Yes, I presume I did.

Q. Because this complaint was filed on August 19th, and you alleged then that these defamatory statements were made to you on August 17th and August 18th.

A. Well, I have never read this. I may have told him the 14th, the 15th, and somehow the dates were wrong. It was my impression that that was given to my attorney before the Bureau of Weights and Measures walked into my place. Now, that is my impression.

Q. When the Bureau of Weights and Measures wanted to serve this notice on you of this claimed violation, they also told you that a hearing had been scheduled for August 26th, did they not?

A. That, I don't remember, sir. I was very upset I was very angry, that they came in with an accusation of being a cheat and a crook and I don't know whether they told me that or not. It is possible that they did.

Q. It may well be you don't recall dates when I say August 26th, but you do know that when they came in to serve that notice on you, they told you there was going to be a hearing, something about like ten days later?

A. I think he mentioned something about "You will be notified when the hearing takes place."

Q. And when you received that notice was when you went to your attorney and filed this lawsuit, before the hearing before the Bureau of Weights and Measures?

A. I told you, sir, if you are trying to bring about the fact that this was filed because of being served with a summons of the Bureau and Weight summons, you are wrong, sir,—

Q. All right.

A. —this was discussed with my attorney prior to ever even knowing, because I—if I can bring my mind up to a better recollection, I have a letter which was written to Mr. Meyer that would bring up dates—

The Court:

All right, let's—

A. If I can look at it.

The Court:
Let's suspend, then, for lunch. Maybe you can check your records and—
A. Yes.

The Court:
—if you do, now, don't testify what your records show, bring them in here, if you find that letter, bring the letter in here.
A. I will, sir, Your Honor.

The Court:
Now, ladies and gentlemen of the Jury, don't discuss the case in the meantime—just keep your seat, sir. Don't discuss the case in the meantime, don't let anybody discuss it in your presence, don't try to find out anything about this case on the outside, and we will recess at this time until 1:45, a quarter 'til two; the Jury will retire quietly and the others will remain until the Jury has retired.

(Whereupon Court was recessed 'til 2:00 p.m., May 22, 1956.)

Afternoon Session—May 22, 1956.

The Court:
All right, will you come back to the stand, Mr. Borak?

Mr. Abbott:
Your Honor please, another witness on the part of the Plaintiff has come in. Would you like to have him sworn—

The Court:
All right.

Mr. Abbott:
—and instruct him as to the rule?

The Court:
Yes.

(Whereupon the witness was sworn by the Clerk.)

The Court:
You will have to wait outside, Mr. Lutz, and don't discuss your testimony with anybody except the attorneys in the case. You may talk to them freely, on both sides.

Witness Lutz:
On both sides?

The Court:
Yes, sir, if either side wants to talk to you, you talk to either one of the lawyers but not to the parties or in their presence.

Witness Lutz:
But the attorneys on any side?

The Court:
On either side.

Witness Lutz:
Thank you, sir.

The Court:
All right.

Mr. Wagner:
Would you mark this, please, Mr. Clerk?

(Whereupon Defendant's Exhibit No. 2 was marked for identification.)

HARRY BORAK, resumed the stand and continued his testimony as follows:

Cross Examination (Continued).

By Mr. Wegner:
Q. Mr. Borak, I hand you this instrument marked D-2 and ask you if that is your signature?
A. It is
Q. And then, on the reverse side is the signature of Edward S. Joseph; is that your attorney?
A. Yes, sir.
Q. He was your attorney in the New York matter?
A. Yes, sir.

Mr. Wagner:
Your Honor, Mr. Vahlsing Senior is here. I would ask that he be excused from the rule, if counsel has no objections, for him to stay in the Courtroom.

Mr. Abbott:
We don't like to enter an objection, Your Honor, but they have two present at the counsel table.

The Court:
I think one representative of the corporation is enough. All right, let's go.

Mr. Wagner:
I will offer D-2 in evidence.

Mr. Abbott:
We have no objection to it, subject—I take that back. Subject to the objection we have already made with respect to the controversy in New York.

The Court:
All right.

Mr. Wagner:
And again, with counsel's consent, I won't take time to read the entire instrument. (Reading portions of Defendant's Exhibit No. 2.)

Q. You gave the Vahlsing people that release when you settled that controversy in New York?
A. I did, sir.
Q. And the release itself recites $10.00. The only consideration paid, that changed hands there, was the $17,500.00 that we have talked about?
A. The $17,500.00 wasn't paid to me for a release there, that was paid to me for money they owed me.
Q. I understand that.
A. I decided to drop the suit and I gave them, willingly, a release. That had nothing to do with the accounts payable that they owed to us.
Q. Well, that's what I am getting at, they didn't pay you any money in addition to the $17,500.00 that they paid you to liquidate your invoices?
A. No, sir, they did not.
Q. All right. Thank you, sir. Now, let's see about this corporation of yours, sir, Roto-Lith, Limited; it has no permit to do business in the state of Texas, does it?

A. That is right, sir.

Q. And, however, it maintains offices in Dallas, Texas, does it not?

A. It does.

Q. And in addition to being president of the company, you are also the owner of the company, are you not?

A. I am a stockholder in the corporation.

Q. Well, a minor stockholder or what?

A. I am a stockholder in the corporation.

Q. I understand that, and my question is, a minor stockholder, do you own just a few shares of stock?

A. My wife is the major stockholder. The stock in the corporation is held between my wife and myself.

Q. Now you, as an individual, loaned large sums of money to the corporation?

Mr. Abbott:

Your Honor, I object to this line of questioning. I see no materiality to it.

Mr. Wagner:

Well, you started it.

The Court:

I don't either. I don't see any materiality.

Mr. Wagner:

Your Honor, he went into the matter of the losses that the corporation suffered in 1954 and that is what I am now interrogating the man about, or starting to.

The Court:

Well, I don't see where what money he loaned would throw any light on that.

Mr. Wagner:
Well, my information—

The Court:
Well, go ahead. I don't want to hear any argument. I would rather hear the evidence.

Mr. Wagner:
Thank you.

Q. You loaned large sums of money to the corporation, did you not?
A. I did not.
Q. Well, the corporation practically doubled its physical plant when, in the latter part of '53 or early '54?
A. '53, '54; our loss took place in '55, sir.
Q. Your what?
A. Our loss took place in the year 1955.
Q. '55. On the matter of earning—

Mr. Abbott:
Just one moment, please. Is this Mr. Vahlsing?

Mr. Wagner:
Yes, that is Mr. Vahlsing Senior.

The Court:
Come around, Mr. Vahlsing.

Mr. Wagner:
I don't know that I want him sworn as a witness. I haven't seen him yet, Your Honor. He just flew in on a plane and I don't know whether he wants to stay around here or not. I will just instruct him to stay

out of the Courtroom, if the Court will permit me to do so.

The Court:
Well, I will do the instructing. Come around, Mr. Vahlsing. I don't see how he can avoid being a witness.

Mr. Vahlsing, I will not put you under oath, but I will put you under the rule. You remain outside and don't discuss the case with anybody except the lawyers on either side, you may talk to them freely. Don't talk about the case to anybody, any of the other witnesses or any of the lawyers.

The Witness:
I will just stay outside 'til you are through.

The Court:
Sir?

Mr. Vahlsing, Sr.:
I could stay outside.

The Court:
Yes, but I am telling you to stay outside and not to talk about your testimony or the case,—

Mr. Vahlsing, Sr.:
I see.

The Court:
—with anybody except the lawyers.

Mr. Vahlsing, Sr.:
I see.

The Court:
All right.

Mr. Vahlsing, Sr.:
All right, thank you.

Q. Well, that is what I am getting at, prior to 1955, you practically doubled the size of your plant, did you not?

A. Only in bag making, sir.

Q. All right, only in bag making; well what do you do besides make bags?

A. Print.

Q. Print?

A. We have three presses.

Q. All right, and this so-called loss that you had in 1955, isn't that due to the fact that you greatly expanded the size of your plant, and, in 1955, took off a large depreciation on this expansion program of yours?

A. The difference between our depreciation of 1954 and '55 was $1100.00.

Q. And you draw a large salary, charge it against Roto-Lith's expense, do you not?

A. My salary in '55 was the same as in '54 and '53.

Q. Well, I still say, it is a large salary?

Mr. Abbott:
Your Honor, I see no materiality as to what salary he draws. Object to the question.

The Court

I will overrule the objection. It might—it might conceivably affect the cerdibility, the fact that he is an officer of the corporation, and the size of it. I don't know. Would you mind stating your salary, please?

A. In '55?

Q. Yes.

A. $26,000.00 a year. Five hundred a week.

Mr. Wagner:

Mark those, please.

(Whereupon Defendant's Exhibits Nos. 3 and 4 were marked for identification.)

Q. D-3 and D-4 are Roto-Lith invoices to Vahlsing, is it not, for—

Mr. Abbott:

May I see them, Counsel?

Mr. Wagner:

Well, I haven't introduced them yet, sir.

Mr. Abbott:

All right.

A. Yes, sir, they are.

Mr. Wagner:

We will offer them. (Passing instruments to counsel.)

Q. While they are looking at those, Mr. Borak, this so-called profit and loss that you testified about in the two years, is that before or after taxes?

A. That is before taxes.

Q. Before taxes?

A. Yes, sir.

Q. What is your year, when you speak of your tax year, is it the calendar year or—

A. Calendar year.

Q. When was this convention that you attended in Dallas?

A. September 21st, 23rd, of 1954.

Q. '54. The big manufacturers of polyethylene bags, aren't there about five that they call the big five?

A. Seven, eight.

Q. Seven or eight?

A. Six, nine.

Q. All right, Shalimar is one, is it not?

A. That's right, sir.

Q. Bemis Bag Company, is another?

A. That's right.

Q. Chase Bag Company?

A. That's right.

Q. Now, I will ask you if it isn't a fact that, at the Dallas convention, that you told us about, if you weren't offering to sell bags at approximately 15% under the established price of the big manufacturers?

A. I have no knowledge of the big manufacturers' prices. We offered to sell bags that showed our company a profit, which we thought was a good enough profit to make. We were not interested in what our competitors were selling,—

Q. You were not?

A. —for less or for more.

Q. Do you say now that you didn't know what the big manufacturers were quoting the same bags that you were offering for, the same quality, size, et cetera?

A. There is no one that can testify that they know, because they have a published list which will say nine dollars, ten dollars, but I have seen Mill Print and Shalimar sell bags for under the published list, so that's why I say no one knows what they sell bags for.

Mr. York:

May it please the Court, Mr. Meyer continues to shake his head and so forth at the witness, in violation of the Court's instruction this morning. We will ask that he be admonished again.

Mr. Meyer:

I'm sorry, Your Honor.

The Court:

All right.

Mr. Abbott:

We reserve our objection I don't know what the materiality of these is, Counsel. I object to the introduction of them, Your Honor, unless it is shown they are material. I don't know what relation they have to this case.

The Court:

Read them to the jury and maybe I can gauge on if they are material.

Mr. Wagner:

This is an invoice bearing date of May 5, 1954, on Roto-Lith stationery, for 421,000 bags, point oh oh one five—what do you call that?

A. Oh oh one five.

Q. Fifteen mills, isn't that what you call it?

A. We call it oh oh one five.

Mr. Wagner:

All right, four hundred and twenty one thousand bags. And the other one is another invoice bearing the same date for 129,000 bags.

Mr. Abbott:

May I make the distinction that those refer to rolls that would be the equivalent of that number of bags?

Mr. Wagner:

That's right, they were rolls of film rather than the bags in its ultimate shape.

The Court:

Any re-direct?

Mr. Wagner:

Counsel asked me a question, Your Honor.

The Court:

Oh, I beg your pardon. I thought you were through.

Q. You said that you bought all your film from only one supplier, Visking?

A. Ninety five per cent of our printable material came from Visking Corporation.

Q. Now, you used, the past three years, is that true, from them, you stated up to now?

A. That is true, fro m1953, as of the present date.

Q. And during all of the intervening time?

A. All of the intervening time.

Q. Ninety five per cent?

A. Ninety nine per cent.

Q. Oh, ninety nine per cent. Now, you mentioned having seen Mr. Vahlsing here in Corpus Christi, I believe you said, in April of 1954.

A. Was it May? April or May?

Mr. Abbott:

Your Honor, I don't recall anything on direct on that.

Mr. Wagner:

Well, maybe it is May. I have sure got a note on it, all right, that he saw Mr. Vahlsing here in Corpus.

A. I have seen Mr. Vahlsing Senior, in Corpus, many times.

Q. Well, the point I am getting at is this, do you recall the occasion when you saw Mr. Vahlsing Senior and you all went to Mathis, and, in company with an employee of his at Mathis, named Tom Simpson, you counted one or more of your boxes, physically counted the bags in the box or boxes?

A. I physically never counted bags.

Q. Sir?

A. I physically never counted bags.

Q. Well, all right, they were counted in your presence, and in that of Mr. Vahlsing Senior?

A. I don't remember, sir.

The Court:

Did you go to Mathis with him?

A. I went to Mathis and I went to Elsa.

Q. And you know you went to Elsa?

A. I went to Elsa with Mr. Vahlsing Senior, in his plane. We left Mathis for Elsa.

Q. Well, while you were at Mathis, one or more of your sealed cartons were opened and counted in your presence, were they not?

A. I do not remember, sir.

Q. And one of the men who did the counting was Mr. Tom Simpson, who works with Vahlsing Company at Mathis; do you not recall that?

A. I have no knowledge of it.

Q. And every box that they counted there in your presence, they announced, were short, did they not?

A. That is not true, sir.

Q. Well, now, maybe I am too definite about it. Did they announce that any of the boxes that they counted were short?

A. How could they—how could you ask me if they announced? I don't even know what you are tlking about.

Q. Well, all right, if you want to put it that way, you recall no occasion in which boxes of yours were opened and counted in your presence?

A. I know of no occasion where I ever counted boxes with Mr. Vahlsing or was in any way around when boxes were counted. I have no knowledge of what you are saying.

Q. All right, were you present when your own attorneys, Mr. Jim Abbott and his partner, Scott Toothaker, opened and counted some boxes—

Mr. Abbott:
Your Honor, I don't believe that that is material at this time, to go into this matter. Subject to the opinion, has the Court ruled that he is going to permit this testimony to come in that we talked about?

The Court:
Yes, I am going to let—

Mr. Abbott:
All right.

The Court:
Yes.

Q. Were you present when your own attorneys, Mr. Jim Abbott and Scott Toothaker, opened some boxes of Max Lutz', of yours,—that is your manufacture, Rotho-Lith's manufacture, and physically counted them themselves?

A. I was not there, sir.

Q. Did they report to you that they had done that?

A. They did.

Q. And did they not tell you that one of those boxes, that was supposed to contain twenty five hundred, one of those boxes was about seven hundred plus short?

A. They told me that the box was short. I don't think the figure was seven hundred. I haven't the knowledge at the moment.

Q. They told you that both boxes they had counted had been short?

A. I believe you are right, sir, they did.

Mr. Wagner:
Would you mark, this, please, sir?

(Whereupon Defendant's Exhibit No. 5 was marked for identification.)

Q. You and Max Lutz are in litigation right now in the state Court up in Hidalgo County, are you not?

Mr. Abbott:
Your Honor, I renew my objection to this line of testimony. This pertains to a suit filed long subsequent to the cause of action on which this action is based and is an action for goods sold and delivered.

The Court:
I sustain the objection at this time.

Mr. Wagner:
All right, Your Honor.

The Court:
I believe we have enough to try here without that.

Mr. Wagner:
That's all, Your Honor. Thank you.

The Court:
All right, re-direct.

Re-Direct Examination.

By Mr. Abbott:
Q. Mr. Wagner, in his cross examination to you, made some inquiry as to your statement regarding

when goods left your office or your building or your manufacturing plant, that they belonged to the person that took them. Would you please explain that?

A. Mr. Vahlsing Junior had arranged with me that instead of me delivering the goods that he purchased from us to Texas, he would have his own trucks pick up at our plant and we were to allow him the freight, which was agreeable to me. After many loads of this kind, while I was out of town, they picked up four hundred and some odd cartons, signed the bill of ladings for good delivery, our plant counted the—

Q. Explain that, they signed the bill of ladings.

A. Well, the bill of lading is a receipt that our shipping clerk had given them the exact amount of cartons that is on the bill of lading, 427 pieces or 380 pieces, and the truck driver counts them, tabs them up on the wall of the cab when he gets his whole load, he signs the receipt for it, that is the bill of lading. He signed the bill of lading for a certain amount of cartons. I was out of town. When I came back, which was six or seven days later, Mr. Vahlsing Junior called me and said, "Harry, my truck got down to Elsa, Texas, and we are short seventeen cartons. You didn't load him right. We will not pay you for it." I asked Mr. Junior whether he was kidding or was he serious. I said, "The bill of lading is—the receipts are signed and the man counted them. Maybe your man lost them on the way down. How could you ask me to pay $500.00 for something that you signed for as receiving in good order?" He said, "Well, you won't lose anything because you didn't give it to him," and since that incident—and he did not pay for them, he made me give them half. Since that incident, I have insisted that if I put it on my truck, I am responsible to Texas, and if he picks it

up on his truck, my responsibility ends when I get my receipt signed. That is the incident.

Mr. Abbott:
Will you mark this for identification, please?

(Whereupon Plaintiff's Exhibit No. 1 was marked for identification.)

Q. Please examine that.
A. I wrote this letter.
Q. Did you write a letter to Mr. Vahlsing Junior relating this circumstance?
A. I did.
Q. Does this purport to be a copy of that letter?
A. That is, sir.

Mr. Abbott:
Do you have the original, Counsel?

Mr. Wagner:
I don't know. I haven't seen it.

Mr. Abbott:
All right. (Passing instrument to counsel.)

Mr. Wagner:
We don't know whether we got it or not. We don't deny it if he says he sent it, he probably did. We don't have it here.

Mr. Abbott:
If Your Honor please—

Mr. Wagner:
Does he say he sent it?

The Witness:
I sent the letter, yes, sir.

Q. You didn't get it back without having been delivered, according to your records?
A. We did not get it back.

(Whereupon Plaintiff's Exhibit No. 1 was read to the jury by Mr. Abbott.)

Q. Now, the inquiry as to instructions that when goods leave your plant, did it arise out of this transaction?
A. It arised out of that transaction, with them picking up on their trucks and then me getting a signed receipt for good delivery and they would not pay me.
Q. Now, when the goods were on your truck and you were responsible for delivery, did you ever make any issue as to that?
A. Never made an issue on my truck. I told them I would be responsible.
Q. I would like to go back to the conversation in the hotel room with you and Fred Meyer. When did that occur?
A. February 12th, 14th, 15th.
Q. What year?
A. 1955.
Q. Was there anything else said in that conversation besides what you related?
A. Yes, there was.
Q. What was it?

A. Mr. Fred Meyer told me that now that he had done his job here, he doesn't know whether Vahlsing would keep him. He asked me what I thought about him approaching Vahlsing for a contract for employment. I advised Mr. Meyer that as long as I knew Vahlsing Senior, he would never give a contract to any employee, and that it was my advice to him not to ask for a contract, but to go up to Mr. Vahlsing and tell him anything on his mind and the man would honestly tell him "Yes" or "No." He then inquired about what I knew about Chase Bag, that he thought he could get a position with them, and what I thought of the company. I told Mr. Meyer that Chase Bag was a good company,—

Mr. Wagner:

Your Honor, what is the materiality of all this?

A. —and then he said to me, "Would you have an opening in your company for me? Would you like to extrude?" I told Mr. Meyer that I had no use for his services in my corporation.

Q. Was that after you had talked with him in the hotel room, he discussed the problem that had arisen?

A. That is after he had said the things he did and apologized about it.

Q. And you had shaken hands?

A. That's right.

Mr. Abbott:

Now, Mr. Borak,—excuse me. May I talk with you and the Court a moment? I want to make sure—

(Whereupon a conference was held between the Court and counsel, at the Court's bench, out of hearing of the reporter and jury.)

Q. Now, Mr. Borak, you were interrogated at length about the lawsuit that was filed in New York City and particularly with reference to when you were served with a summons or a civil citation, however they characterize it, by the Bureau of Weights and Measures, with relation to when you filed your cause of action. Do you have any memory as to when you received this civil citation?

A. I cannot place the date. I thought I had some papers that would pin-point it, but I haven't. I do not know the date that I was served with the citation.

Q. You don't know whether you were served with the citation before the suit was filed or after?

A. I do not. I lean toward that I was served afterwards. I am not sure.

Q. Would you tell us what happened?

A. From the time—

Q. When did you quit producing bags for Vahlsing?

A. Well, the deliveries there were much later than after I stopped producing. I stopped producing in January, I believe, or maybe February. January, I think, and these were bags that were in my stock, which they had not taken out because their business had tapered off, and they promised me they would take them next month and then next month and then next month and I had this accumulation of $21,000.00 worth of bags. I finally invoiced it to them in May, with their promise that they would take it out in July, and then they did take it out in August, maybe the latter part of July, the early part of August.

Q. And when you produced these bags as far back as January or February,—

A. December or January.

Q. —and up to the time this suit was filed, had you ever been paid for them?

A. For those bags?

Q. Yes.

A. Yes, I had. Oh, this suit on—

Q. The first suit.

A. Oh, no, sir, I had not been paid.

Q. Well, what were the transactions leading up to that suit, between you and the Vahlsing people?

A. Well, I wanted my $21,000.00 that they owed me. It was six months old. I started to get a little bit worried about it. I started to make some credit references and I kept insisting. "I want my money;" five months after the invoices were due, and these invoices were due in thirty days, net, for the first time, I was told that there was a shortage in Elsa.

Q. And when were you told that?

A. Early part of August or the last part of—the early part of August of 1955.

Q. And that was after the invoices had long been due?

A. Invoices—the money was due to me five or six months.

Q. Did you have a conversation with Fred Vahlsing Senior about the invoices, your request for money?

A. I had conversations with Vahlsing Senior, with Vahlsing Junior, with their accountant, their bookkeepers, with anybody that had anything to do with money.

Q. Now, an inquiry was made with respect to your examining their books to see how much they owed

you. Do you have any recollection as to what you did do at that time?

A. Well, I knew what they owed me, I had statements in my books. The inference there was that I thought they were getting ready to pay me and they wanted to check how much freight allowance they were entitled to on these invoices, because I allowed them the freight when they picked it up and they wanted me to go through the invoices with the controller, their bookkeeper, to pin-point whether I owed them five hundred, six hundred, eight hundred, for freight that they were entitled to.

Q. Now, ordinarily, do you pay freight to destination?

A. Well, price is sold delivered.

Q. And in these instances, they had picked them up at your shed?

A. They always had except the first month of business, when they devised the means of me allowing them the freight and they would pick it up with their own trucks.

Q. Now, they have inquired as to this $17,500.00 settlement. What is the exact figure?

Mr. Wagner:

Seventeen five eighty five.

The Court:

Approximately is all right, isn't it?

Q. I would like to inquire if you know about the visit to your office by the officers of the Bureau of Weights and Measures?

A. Mr. Dolan?

Q. Was it Mr. Dolan?

A. Yes, I believe it was.

Q. What did he say to you?

A. I was sitting in the office and Mr. Dolan came into what we call our general office, where there are a few girls, and said, "I have a summons for you for being short—I have a summons for short weight and short count." At first, I didn't know what he was talking about, but I got pretty mad and then I started to realize that he was talking about Vahlsing. I took the summons from him and I said, "Let me see this," and I took the summons which said that on rolls, I delivered less pounds than the invoices called for. I says, "How do you know this to be true? Did you weight them?" He says, "Yes, I weighed them all and I checked them out." I said, "How many rolls have you got here?" And it came to 187 rolls. I says, "Well, don't you—" and he said he was short forty pounds, that was the violation. I says, "Well, you don't see that you are short two rolls from what the bill calls for? The bill is marked that Mr. Fred Meyer took two rolls from our plant and that the weight is included in this invoice, and that one is actually forty pounds over, that he took sixty five pounds away," and he started to get very embarrassed and he said, "Wait a minute," and he went to the telephone and made a call; now, I don't know whether the call was Vahlsing or Meyer; when he got through with the call, he hung it up and took the summons and tore it up and I said to him, "What are you tearing it up for? Why don't you bring it down to your superior and show him that his weight was off?" He says, "That is my business." He said, "Now, here is another summons here."

Q. That was on short weight?

A. The first one was on being short on weight, which he tore up and I—then he gave me another summons.

Q. Now, you had, as a result of that inquiry by the Bureau of Weights and Measures, apparently,—you don't know when that was done, do you?

A. The date?

Q. Yes.

A. No, middle of August, latter part of August, I don't remember.

Q. In settling this claim for shortage with Vahlsing, on the $21,500.00 balance, you took, in the end, as I understand it, $17,585.00. Now, that is a difference, as I think the counsel and I agree, of $3,015.00.

A. That's right.

Q. Do you know what that was based upon?

A. Oh, yes, sir, the $3,015.00 was given to them for discount, which they insisted—we have one per cent ten days terms, net thirty; they insisted upon their one per cent, even though the bills were five or six months old. I gave it to them. They were entitled to the freight, which had not been deducted from this total, which came to six or seven hundred dollars. Mr. Vahlsing Junior made me pay him for half of the $500.00 for the seventeen cartons which he signed for and said he did not get. The balance of $1,800.00 was given to them on a complaint that Mr. Meyer had made tests that on the rolls of polyethylene, the weight, the thickness of the polyethylene was heavier than it should have been and therefore he was getting less bags. I turned that complaint over to the Visking Corporation, who manufactured the polyethylene, and the Visking Corporation gave me a go-ahead to do what I could to satisfy them. I

gave them $1,800.00 on that complaint, which the Visking Corporation, the following day, sent, to Roto-Lith, a check for. In actuality, I gave the Vahlsing Company $1,200.00 discount, freight, and eight and a half cartons, which made my half for out of the seventeen that he said he didn't get, although he signed for it.

Q. Now, did Mr. Fred Meyer ever contact you with reference to having made an investigation and determined that there was any shortage?

A. Mr. Meyer called me on August the 19th—Mr. Meyer called me on August the 19th, from Robbinsville, New Jersey, I believe, or Newark; he told me that he had just counted this lot that he had gotten, or he had weighed it, and he comes up with an estimate of three and a half per cent short, or three and three quarters per cent short; would I like to come out and verify it and check the count. I quickly said to Mr. Meyer, "Well, this whole thing amounts to $154.00;" that I assured Mr. Vahlsing that 98% of a good delivery, he will get, so the whole thing amounts to $80.00, that it is cheaper to give him the $80.00 than to send three men or two men ir four men from my plant to Jersey to count millions of bags, that even though I were to give it to him, if it were to be a means of me getting my $21,000.00, I will give him the $80.00. Roto-Lith then made a credit out to the Vahlsing Corporation for $80.00 in change, a letter went forward with it describing the entire conversation, the date, the time, and the Vahlsisg group, in paying it, took the $80.00 off of my bill.

Mr. Abbott:

Will you mark this for identification, please, sir?

(Whereupon Plaintiff's Exhibit No. 2 was marked for identification.)

Q. I show you what has been marked Exhibit P-2 and ask you if you recognize it?

A. This is the letter that I sent to Vahlsing with the credit, after my conversation with Mr. Fred Meyer.

Mr. Abbott:

Is there any objection to it, Counsel? If not, we would like to introduce it in evidence, Your Honor, and I would like permission to read it to the jury.

Mr. Wagner:

Well, Your Honor, it has got a bunch of self-serving statements in it that I think are inadmissible.

Mr. Abbott:

The letter is dated August 19, 1954, Your Honor.

The Court:

You may read it to the jury.

Mr. Abbott:

Thank you, sir.

(Whereupon Plaintiff's Exhibit No. 2 was read to the jury by Mr. Abbott.)

Mr. Abbott:

Now, I would like to have this marked for identification, please, sir.

(Whereupon Plaintiff's Exhibit No. 3 was marked for identification.)

The Court:
If you have got any more you are going to introduce, let's have them all marked for identification.

Mr. Abbott:
I believe this will wind them up, Your Honor, for the moment.

Q. I show you what has been marked for identification as letter P-3—as Plaintiff's Exhibit No. 3.
A. I wrote that letter. I dictated it.

Mr. Abbott:
Do you have any objection to this?

(Whereupon an instrument was passed by Mr. Abbott to Mr. Wagner, and then returned by Mr. Wagner to Mr. Abbott.)

Q. All right, sir, a moment ago, we were discussing the complaint served on you, or civil citation, whatever it was, by Mr. Dolan, and that you say that he served you with the citation and then tore it up.
A. He tore it up after I showed him where he didn't count the right amount of rolls, and made a phone call.

The Court:
All right, you have told us that.

Mr. Abbott:

All right, if I may have permission to read this to the jury,—

The Court:

Yes, sir.

(Whereupon Plaintiff's Exhibit No. 3 was read to the jury by Mr. Abbott.)

Q. Mr. Borak, you were further inquired on cross examination about your libel suit against F. H. Vahlsing and F. H. Vahlsing Junior, in New York City, and as to the settlement for $10.00. Would you go into the whole story as to how that came about, please?

A. The settlement, sir?

Q. Yes.

A. Well, I didn't get anything. I released them, because the slander and what they called me was confined to their office, it had not reached anywhere outside. I had no actual financial loss. They apologized to me and I didn't get any money, I just released them.

Q. Were you attempting to settle that matter at that time without any litigation?

A. Oh, yes, I wanted to. Mr. Vahlsing Senior and I shook hands. He said he was sorry for what he said. I told him that, "Well, maybe I shot off a little too, but what you said wasn't right, and after you cooled down, maybe I wouldn't have served you," and we shook hands and talked.

Q. And thereafter, what were your relations with Mr. Vahlsing Senior?

A. Extremely friendly, as of today.

Q. Has Mr. Vahlsing Senior had any—what are the contacts that you have had with him since that time?

A. Well, I have spoken to Mr. Vahlsing, since that time, many, many times. Here recently, he asked me if I would be good enough to cast my opinion upon the product that Texas Plastics was making, such as the quality of the ink, the bag construction. He sent me samples. He wrote me a letter, "Dear Harry, what do you think about it?" I wrote him back. I wrote he was doing a wonderful job, called him "Fabulous Freddie" for doing it so well. No criticism.

Q. When did this occur?

A. Four months ago, five months ago, I don't remember. I have a letter from Mr. Vahlsing Senior asking me for my opinion of what they were manufacturing.

Mr. Wagner:

What is the materiality of this, Your Honor? I don't want to stop them if there is any point to it.

Mr. Abbott:

Well, I wanted to rebutt your point as to the dismissal of that suit and I wanted to bring out that they tried to shake hands.

The Court:

Let's get along. Any cross examination?

Mr. Wagner:

I don't think he is through yet. Sure I want to ask him a few questions, if he is through.

The Court:

Well, I didn't know that, but—now, look, if you have got any more letters, let's get them identified there. I want him looking them over while we are going ahead reading one.

Mr. Abbott:

All right. We have no further questions at this time.

Re-Cross Examination.

By Mr. Wagner:

Q. Now, Mr. Borak, about your responsibility ending when they are put on the truck, that is true as to the number of cartons, is it not?

A. That is true due to the—

Q. Just a minute. That is true as to the number of cartons, is it not?

A. That's not so.

Q. It is not true that your responsibility ends as to whether cartons marked "twenty five hundred bags" have twenty five hundred bags in them or not, though, is it?

A. The statement that I made to Mr. Meyer, after being confronted with getting the good delivery and a signature, was that my responsibility will cease on my plant, bags or rolls, that if he wished to count bags, I would give him all the help he wanted, on my floor; once they got onto his truck, I would be in no way more responsible, because I have knowledge and know, through our shipping containers, that bags can be taken out of the cartons without destroying the seal, and no evidence of it being touched in any manner, and when a man can sign a delivery that he received and then tell me that he is not pay-

ing, I have to be very careful, and I told Mr. Meyer, "I give you two million bags; if you have doubt that there are, let me know when you come up, I will give you twenty boys, I will give you twelve boys, we will count them right here; you put them on your truck, I am finished." That was my statement to Mr. Meyer.

Q. Those bags are worth less than a cent apiece, aren't they?

A. $7.00 a thousand.

Q. They are worth less than a cent apiece?

A. Three quarters of a cent apiece.

Q. It costs more in labor than the bags are worth, does it not, Mr. Borak?

A. I offered to count—

Q. Answer the question, please.

The Court:

Yes, answer the question, please.

Q. It costs more to count these bags than they cost, doesn't it?

A. I would say so, yes, sir.

Q. And you take the position that although your carton is marked "2,500," that you have no further responsibility, whether there is 2,500 in that carton or not, as soon as they leave your plant?

A. I did not say that, sir.

Q. That's what you just told me.

A. No, I said that if I were to put this on my truck and make the delivery, I am responsible. "If you put it on your truck, my responsibility will cease with the signing of the delivery. If you wish to examine any cartons, I will give you all the help you want. You can supervise it and count it. Once you

sign the delivery, receiving them, and it is on your truck, you and I are through. If you want me to deliver them, I will be responsible to wherever you want them to go." That was my conversation with Mr. Meyer.

Q. All right. Now, let's see if I am clear about this. Who do you say you had an agreement with that they would accept the 98% instead of demanding 100% of what you charged them for?

A. Vahlsing, Mr. Vahlsing Senior, when he wanted me to keep making these bags and I explained to him that a midnight shift was impractical for me, that I could not guarantee 100% count,—

Q. Now, when was thhat?

A. —but I would guarantee a minimum of 98%; he told me he would be satisfied.

Q. Now, when was that conversation?

A. Oh, that would be October or November of '53.

Q. That was before you ever delivered a bag?

A. No.

Q. You had already started delivering?

A. I believe so, sir.

Q. I thought you told me you started in December or January.

A. You are talking about 1955?

Q. No, we didn't have any business with you in '55, did we?

A. Fifty five is when I had my $21,000.00 not paid to me yet. I got it in August of '55.

Q. Wasn't that August of '54? You didn't even file this lawsuit—I mean you filed this lawsuit in February of '55. We are now—

A. Would you repeat that, sir?

Q. Yes, you started manufacturing Vahlsing bags in December of '53 and January of '54, did you not?

A. I started manufacturing bags, polyethylene bags, in September of 1953.

Q. Yes, but Vahlsing bags.

A. The Vahlsing invoices were paid to me in August of 1954, the $21,000.00.

Q. I understand that, now, that is what I am getting at,—

A. But he had already received bags from me in November and December. This was a carry-over that was on my plant, that he would not accept, because he said his business wasn't good and he didn't need the bags, and how the roll stock came about was—

Q. Now,—

The Court:

Now, just wait. Just wait, now. Just answer the questions.

Q. Again I ask you, it is true, is it not, that you started your Vahlsing bag making in December of '53 or January of '54?

A. I would say in November or December. November of '53.

Q. All right.

A. Or maybe October, October of '53.

Q. All right, and in May of '54, that is about six or eight months later, you were still manufacturing Vahlsing bags?

A. I was not, sir, these bags had all been manufactured and ready for delivery for December or January and he refused to take them; they were finished, laying in my plant.

Q. I see. And when was this conversation that you say you had with Mr. Vahlsing in which he said he

was so anxious to get your bags that he would accept 98% of what he was paying for and not 100%?

A. That was in my office, at my plant, with Mr. Vahlsing Senior calling me up and asking me if I would be in at 3:00 o'clock so he could see me and talk with me, so that he could visit with me.

Q. All right, when was that, what part of the year?

A. Well, that is when he went into his heavy season and wanted so many bags from me.

Q. All right.

A. I don't know—November—October, November, of '53, October, I would say, of—or November of '53.

Q. Right at the start?

A. Right at the start, when he wanted me to go twenty four hours, I brought him into the plant, I showed him how we were doing it, I told him how physically impossible it was for me to accomplish—

The Court:

Now, listen. You answered the question.

Q. What was the date of your first invoice to Vahlsing?

A. I would have to—

Mr. Wagner:

Don't you have them here, Counsel?

(Conference between counsel, out of hearing of the reporter.)

Mr. Wagner:

Well, that's what I am asking him.

Q. Well, not to take the time of the jury now, Mr. Borak, I will ask you, when you get off the witness stand, check your invoices, so that you will be able to tell us the date of your first invoice and its amount and what it covered and like that.

A. I will, sir.

Q. Thank you. Now, then, one other subject and I think I am through. At the last time that you were in Vahlsing's office, in August, when you had this blow-up that you told about, you have alleged here, have you not, in this—your New York petition, that on August 17th, you were in there, and they libeled you, and you were in there on August 18th and they libeled you. Now, it is that occasion that I am asking you about now, and I will ask you if it isn't a fact that on the last day that you were in there—now, of course you may have been in later in September, I am not talking about any other occasion, but the last time when you were trying to get them to pay you that $21,000.00, isn't it a fact that you talked to Fred Vahlsing Senior and wanted him to make you an advance against your unpaid invoices and he refused to do so and left saying that he wasn't going to pay you anything on those invoices until the Bureau of Weights and Measures finished the check they were then making, and he asked you to excuse him, he had a very important business engagement, and he left and you remained there at the Vahlsing offices?

A. That is not true, sir.

Q. All right.

A. He always offered to pay me if I would give him $7,000.00.

Q. All right, and did you not then go into Fred Vahlsing, Junior, and tell him that you urgently needed $10,000.00 and that if he would advance you $10,-

000.00 against the unpaid invoices, that you would make an agreement with him to apply the shortage that the Bureau of Weights and Measures found, if they found a shortage, to all of the charges you had made against the Vahlsing Corporation? Did you not offer to do that?

A. Mr. Wagner, I have never offered to do that. As far as asking Mr. Vahlsing Junior for money, I screamed my head off—

Q. Now, wait a minute, please, Mr. Borak.

The Court:

The answer is "No." He has answered. That's all.

Q. And isn't it further a fact that he said, "Well, I will tell you what I will do, Harry, I will do that, I will go out—" He is a very busy man, is he not?

The Court:

Well, now wait a minute. He has already answered that. Why go into all that, over and over. You went into that this morning.

Mr. Wagner:

I want to be sure I have a predicate laid, Your Honor,—

The Court:

Well, you—

Mr. Wagner:

—I don't want them to later say that I haven't asked him.

The Court:
Well, you—I say you have.

Mr. Wagner:
All right, sir. Well, that was the last thing I wanted to go into.

The Court:
All right, sir. All right.

Mr. Abbott:
I would like to have one question.

The Court:
All right, one question.

Re-Direct Examination.

By Mr. Abbott:
Q. What conversation did you have with Mr. Fred Vahlsing Senior on or about the time that he is referring to?
A. I asked him for money. I told him these bills were five, six months old.

The Court:
I believe I will sustain the objection to that. If you want to direct hin attention to something in particular, all right, but I don't want—

Mr. Abbott:
May I do so?

The Court:
All right. Yes, sir.

Q. Did he make a claim against you for an exorbitant shortage that existed at Elsa and Mathis, Texas?

A. He wanted $7,000.00. "I will give you a check for fourteen and we will call it even. You made enough money on me."

Q. And what did you say to him?

A. I told him that I wouldn't give him seven pennies, that he owed me $21,000.00 he had promised to pay me for three months; "Now, for the last time, when I am here and tell you that you have got to pay, now you first tell me that you have got a shortage." He never mentioned it before.

The Court:
That is three times we have heard that.

Mr. Abbott:
I didn't recall that.

Q. Why—on what did he base the shortage at Mathis and what did you respond to him?

A. They finished the season at Mission and he is short a million and some odd bags, which is $7,000.00, and it is my fault, and I said to Mr. Vahlsing, "You are buying from many converters; why do you pinpoint at me? Why haven't you complained to me before? Why haven't you told me? Now that you come to a point where you must pay me my money, you tell me that. Why didn't you tell it to me a week ago, a month ago, three months ago?"

Mr. Abbott:
All right.

A. I was astonished.

Mr. Wagner:
No further questions.

Re-Cross Examination.

By Mr. Wagner:
Q. Didn't he tell it to you at Mathis in April, 1954?
A. Mr. Vahlsing never told me about being short or wanting anything until in New York, when it got so close that he knew that I probably would sue him for the $21,000.00.

The Court:
That's all. Call your next witness.

MARION BLACKWELL, having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Abbott:
Q. You have been sworn as a witness?
A. I have.
Q. Please state your name.
A. Blackwell, Marion.
Q. Do you go by any other name?
A. Bob.
Q. Where do you live, Mr. Blackwell?
A. Houston.
Q. Are you employed there?
A. Yes, I am.
Q. What is the nature of that employment?
A. As a salesman for Lone Star Bag Company.

Q. Where have you worked for them? Have you worked in the Rio Grande Valley area?

A. Yes, they sent me down on a promotional deal with Texas Plastics, Incorporated.

Q. Do you have any title with Lone Star Bag Company?

A. Assistant sales manager.

Q. You worked in the Rio Grande Valley when?

A. Oh, January, February, March, April of last year.

Q. That would be '55 or—

A. Yes, sir.

Q. Fifty—fifty five?

A. Right, sir.

Q. Do you know the Defendant, Fred Meyer?

A. Yes, I do.

Q. Where did you first meet him?

A. At Elsa, Texas. Texas Plastics.

Q. Did you ever meet him anywhere else outside of this area?

A. He visited us at our office in Houston.

Q. What was the purpose of that visit?

A. An indoctrination program on polyethylene.

Q. Had your company ever handled polyethylene prior to that time?

A. No, we hadn't.

Q. What was the nature of this indoctrination program?

A. Well, we needed to be familiarized with the different aspects of the whole business, and knowing what polyethylene was—in essence, we didn't have the slightest idea—and what it was used for, and the places that consumed it, and the potential markets, the competition in the line.

Q. It was new to your particular company?

A. Altogether.

Q. You do a large volume of business throughout the United States, as I understand?

A. Right, we do.

Q. What did Mr. Meyer say to you at that orientation meeting?

A. Well, it was rather basic. I mean he explained the difference in polyethylene film, the different types of manufacturing, the different types of printing and so forth that could go on, the different consumer products of that type.

Q. Different what?

A. Of a product of that type.

Q. Did he give you any specific examples of how the work was done and—

A. Right, he did, he had various charts and forms, showing the various aspects o the business.

Q. And how did he relate that to his indoctrination or orientation program?

A. I don't follow you.

Q. Well, these charts, what purpose did they serve?

A. Well, they served as a visual aid for the salesman that had never heard of polyethylene and gave them ideas of how to sell the merchandise and what they were dealing with. Of course they were not going to be privileged, like I was, of coming down to the plant and watching it in actual operation.

Q. He was giving you sales background and information?

A. Right, sir.

Q. Now, at any time during the course of these instructions, did he mention Roto-Lith, Limited, or Harry Zorak?

A. Well, at one stage of the examples that he was giving us, he was talking about the various ways the consumer could be cheated on merchandise in the polyethylene field, it wasn't quite like the other merchandise that we had been dealing with, we knew how to find out if a customer had been cheated by a competitor, and he pointed our Roto-Lith as being an example of a customer that might, and had, with F. H. Vahlsing and Company, shipped merchandise that was not up to par, it was supposed to have been a different grade of film that they had made the bags out of, and different count of bags in a box. There happens to be, I think, about three thousand of the little bags in a box, and there was examples of customers of Roto-Lith, Incorporated, having received twenty five hundred to three thousand in a box instead of the number that was supposed to have been the actual count, three thousand, in the box.

Q. Can you relate what he said specifically? You are dealing in generality now. Was there any specific word in his statement?

A. Well, he stated that they had shipped to F. H. Vahlsing and Company and that during the time that they had received the merchandise for F. H. Vahlsing and Company from Roto-Lith, Incorporated, that they had had a test case and had gone to Court, had sued Roto-Lith, Incorporated, and he had won the case for them, and he said he had documentary proof, so he said, to prove it.

Q. Now, this occurred up in Houston. After that, did you move to the Valley?

A. Yes, sir. Well, I, at the time, was in the Valley. I had just gone back to Houston with him for an indoctrination.

Q. Did you have any further discussions with Fred Meyer regarding this same subject, in the Valley?

A. Yes, sir, after we had had quite a successful sales program, we thought, in the Rio Grande Valley, we—

Mr. Wagner:

Now, just a moment. I am going to object to any other occasion, now. The charge is that, at this indoctrination meeting in Houston, certain statements were made by Mr. Meyer to this gentleman. Now, I have not made any objection to that, but they are now going into something else here about down in the Valley and there is no charge or notice or anything else that they have got some other occasion.

Mr. Abbott:

May I have the amended pleadings, please?

Mr. Wagner:

I don't have a copy of it, but I—

(Conference between counsel and the clerk, out of hearing of the reporter.)

Mr. Abbott:

Your Honor please, in Plaintiff's Original Compiaint, on page—

Mr. Wagner:

I don't know about the Original Complaint. I know the one that he went to trial on.

Mr. Abbott:

First Amended Original Complaint, paragraph 6, "That during the months of January and February, 1956, in the city of Houston, Harris County, Texas, and McAllen, Hidalgo County, Texas, the defendant, Fred J. Meyer,—"

Mr. Wagner:

Uh huh. I guess so. I note the two months here.

The Court:

I noticed it was inserted in there, but it would be admissible anyway, I started to say—it would be admissible anyway as the question of if he makes it one place, he might make it at another place; similar statements would be corroborating. Go ahead.

Q. Now, you have stated that you had a conversation with Mr. Fred Meyer, at McAllen, Texas. What was this conversation, with specific regard to what was said by him about Roto-Lith and Harry Borak?

A. Well, we felt like we had had quite a successful sales campaign and then we had some competition come in that—price wise, Mr. Borak was under-selling us a little bit, which was his privilege, and at that time, we had some customers that didn't feel quite like they wanted to live up to some contracts that I had written for them, and—which was all right by my company, we agreed to let them out if they could save money on some other business proposition, why, we were in favor of it, and it didn't quite meet too well with Mr. Meyer's feelings, Mr. Borak coming down and underselling us, and he called him something like a cheap chiseller that would come down here and undersell us and—

Q. What else did he say?

A. Well, he did make a statement on several occasions that whether the customer bought at a lower price didn't mean anything because they weren't to get the quality of merchandise they were going to get if they had bought from us, that they were going to be paying an equal amount, even though they got a cheaper price.

Q. What else did he say?

A. Well, offhand,—

Q. Did he make any reference to having sued Roto-Lith?

A. Oh, yes, uh huh, supposed to have had documentary proof that he had sued Roto-Lith and won the case in New York for F. H. Vehlsing and Company.

Q. Did he ever state that that is how he got started with Mr. Vehlsing?

A. Well, that was how he got in the polyethylene field.

Q. All right. Did he—

The Court:
Sued?

A. Yes, sir.

The Court:
Did he say how the suit came out?

A. That he had won, sir.

The Court:
Who had?

A. Mr. Meyer had won the suit for F. R. Vahlsing and Company.

Q. Well, did he ever refer to them in any other words than as a crook and cheap chiseller?

A. Well,—

Mr. Wagner:

Your Honor, he is putting the words in the mouth of the witness.

Mr. Abbott:

I beg your pardon. I thought that those were his words.

Mr. Wagner:

No, they were not.

The Court:

Well, he said "chiseller," I remember that. I don't remember the "crook."

Mr. Wagner:

He didn't refer to these people as that. He said that "cheap chiselers come down and undersell us," yes.

Q. Did he refer to Roto-Lith and Harry Borak at that time? Who was he talking about?

A. About Roto-Lith and Harry Borak. They were the only competition we—

The Court:

Was the word "crook" used by Mr. Meyer?

A. Yes, sir.

The Court:
Was the word "chiseller" used—
A. Yes, sir.

The Court:
—by Mr. Meyer?
A. Yes, sir.

The Court:
I had to ask you that question because you seemed to be hesitant about using the exact language, you have been sort of summarizing it here.
A. Yes, sir.

The Court:
A shorthand rendition of it, maybe. All right.

Q. At these times that Mr. Meyer was upset about Mr. Borak getting business, was that when he made these additional statements to you?
A. Yes, sir.
Q. And what did he suggest that you do?
A. That I explain these things to the customers, but I couldn't take it onto my company to go out and explain that somebody had undersold us because they were going to deliver inferior merchandise.
Q. And you didn't do that?
A. Certainly not.
Q. Did you ever have any occasion to contact Mr. Mose Feld? As I understand, the president of Lone Star.
A. Right, sir.
Q. Have you ever had any contact with him with reference to Fred Meyer?

A. Yes, sir, I—Mr. Meyer like to have cost me my job because of some things that he was—

Mr. Wagner:
Now, Your Honor, I don't know what this is, but I am going to object to it.

The Court:
Yes, I sustain the objection, I believe,—

Mr. Abbott:
If I can prove—

The Court:
—unless he discussed it with Fred Meyer.

Mr. Abbott:
If I can prove the materiality of it,—

The Court:
Unless he discussed it—did he discuss it with Mr. Meyer? Did you ever discuss it with Mr. Meyer?
A. Yes, sir.

The Court:
Huh?
A. In what respect, sir?

The Court:
Did you ever discuss with Meyer about what you say he tried to do to you, or did to you?
A. Well, I think Mr. Meyer is well aware of it, sir.

The Court
What?
A. I think Mr. Meyer is well aware—

The Court:
No, I didn't ask you that. I will let you tell what you said to him. "Now look here,—" if you said to him, "Now, look here, this has come to me and—" I will let you tell about that.

A. Well, we did, sir. We came to verbal blows in my boss' office.

The Court:
All right.

A. Over this very incident.

The Court:
All right.

Q. What conversation did you have with Mr. Mose Feld that Mr. Meyer was acquainted with?
A. Well,—

Mr. Wagner:
Now, I am going to—

The Court:
I am going to sustain the objection at this time. It might become material later on the question of interest or want of interest of this witness in the outcome of the case. You can cross examine at this time.

Mr. Abbott:
I have another question, Your Honor.

Q. Did you make these inquiries to Mr. Meyer about what type of company Roto-Lith was?
A. No, sir.
Q. What did happen?
A. It was all volunteer information, because I didn't particularly care what kind of company Roto-Lith was. I didn't sell for them.
Q. He volunteered the information to you about this company?
A. Yes, sir.
Q. In the words that you have stated, or substantially so?
A. Right, sir.

Mr. Abbott:
I have no further questions. Just a moment.

Q. Did you ever hear any reference by Mr. Meyer to a transaction with the Bureau of Weights and Measures in New York City?
A. Right, sir. I think they were a part of the lawsuit that he took to Court against Roto-Lith.
Q. What did he say about the outcome of that?
A. The outcome was that he had won his lawsuit and that Roto-Lith made the settlement according to the judgment.

Mr. Abbott:
That's all.

Cross Examination.

By Mr. Wagner:

Q. Mr. Blackwell, your company was Lone Star?

A. Lone Star Bag Company.

Q. Lone Star Bag Company?

A. Right, sir.

Q. And when Texas Plastics, Incorporated, first started operating, Lone Star Bag Company was the exclusive sales representative of Texas Plastics, Inc., was it not?

A. Right, sir.

Q. And Mr. Meyer, as amanger of Texas Plastics, came to Houston and had about a two or three day indoctrination meeting with the Lone Star Bag Company salesmen?

A. Right, sir.

Q. To explain to them the nature of polyethylene bags and their merits and things of that sort that you have explained to us, and I will ask you if, in connection with those indoctrination meetings, he did not tell you, "Now, the big companies, the big operators, in manufacturing bags, they all have a standard price and we are going to sell at that price." In other words, that he wasn't going out to get business by cutting prices.

A. All right, sir.

Q. Isn't that right?

A. Yes, sir.

Q. And didn't he tell you, "Now, when you are out trying to sell, you are going to find that there are—they call these men who make these bags, as distinguished from the extruders, who make the film, the bag manufacturing companies, call them converters, don't they?

A. Yes, sir.

Q. "When you get out trying to sell bags, you are going to find that there are a bunch of small chisellers in the field who will sell bags at less than our prices." Didn't he tell you that?

A. Essentially, yes, sir.

Q. Essentially, that was it. And he said, "We are not going to meet that kind of competition," isn't that right?

A. Yes, sir.

Q. "And when the customers tell you that, 'Why should I pay you eight and a half a thousand; look here, I have got a quotation from some other company for a dollar a thousand less than your Texas Plastics Company,' you can tell them that they can't look at the first price and know whether that is going to be the final price or not," didn't he tell you that?

A. Yes, sir.

Q. That these small chisellers can take the purchasers in one of several ways, they can short count on their delivery, that is not have as many bags in the box as the box is marked for; didn't he say that?

A. Yes, sir.

Q. Second, they can quote from outside dimensions instead of inside dimensions; you remember his mentioning that?

A. Yes, sir.

Q. Now, that means that ordinarily, you sell these polyethylene bags quoting the inside dimensions?

A. Right, sir.

Q. But these small chisellers can quote from outside dimensions rather than inside, and that way, there is less material in the bag than when quoting inside dimensions, isn't that right?

A. Yes, sir.

Q. And another way is that they can deliver a lesser gauge film than they contract to deliver, that is another way they can cut the price?

A. Yes.

Q. And another way is using scrap film instead of first run extruded polyethylene?

A. Right, sir.

Q. And didn't he tell you, "In that connection, now, I will tell you of an experience that Mr. Vahlsing had with a company named Roto-Lith"?

A. Right, sir.

Q. "Mr. Vahlsing found out that he was thousands of dollars short in his bag inventory and he couldn't figure out where those bags were going." Didn't he tell you about that?

(No answer heard.)

Q. "And he finally decided to check the number of bags in boxes he was getting from Roto-Lith and filed a complaint with the Bureau of Weights and Measures and they verified the fact that Roto-Lith's boxes were short counted." Didn't he tell you that?

A. Yes, sir.

Q. "And he had a lawsuit over the matter with Roto-Lith and he won the lawsuit"?

A. Right, sir.

Q. That is it?

A. Right, sir.

Mr. Wagner:

That's all.

Re-Direct Examination.

By Mr. Abbott:

Q. With respect to Mr. Wagner's questions about what Mr. Meyer was telling you, he states them in the position that "This is what was done." Let me ask you, was the thing that was related to you by Mr. Meyer something as an experience in the past or something that was prospective that would be done to other customers?

A. Well, I am sure it was in the light for our future sales, for us to be aware of it.

Q. And that he would do it in the future?

A. Right, sir.

Q. And that he would chisel in the future, to the customers, and they would get less than they bargained for, so to speak?

A. Right, sir.

Q. There is no doubt in your mind about what he said, is there?

A. No, sir.

Q. Let me ask you this, was there any apparent ill will existing on the part of Mr. Meyer toward Mr. Borak at the time that Mr. Borak got some orders down here?

A. At that time, yes, sir. Previous to that, there wasn't.

Q. And what was that ill will born of?

A. Sales.

Q. You did not request any information, he volunteered it to you?

A. Yes, sir.

Q. During the course of these instructions, describe Meyer's personal conduct, was he excited or not excited or—

A. Very much excited. I mean I have had phone calls from Mr. Meyer as late as one and two o'clock in the morning, at my hotel, and conversations that actually didn't mean anything to me in my sales program, but they excited him to the point that he couldn't stay away from our customers that we—

Q. He did call on your customers?

A. Right, sir, and even after I sat, in the presence of Mr. Fred Vahlsing himself, and he told Mr. Meyer not to call on the customers, not to even talk with them if he met them in the hotel or some place, well, he insisted on calling on them after that.

Q. And he did do so?

A. Right, sir.

Mr. Abbott:

I have no further questions.

The Court:

You will be excused, sir.

A. Thank you, sir. Your Honor, does that mean I am finished, I can leave,—

Mr. Abbott:

I would like to have an opportunity, Your Honor, to have a recess for fifteen minutes so I can discuss that.

The Court:

All right, it might be—

Mr. Abbott:

I may need him as a rebuttal witness, Your Honor.

The Court:
I know you may. I gather you might, but—that will be up to you and the lawyers who have summoned you.

The Witness:
All right, sir.

The Court:
All right, ladies and gentlemen, do not discuss the case, don't let anybody discuss it in your presence. You may retire quietly and be back in fifteen minutes.

(Whereupon a fifteen minute recess was taken.)

MAX LUTZ, having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Abbott:
Q. Now, Mr. Lutz, I believe you were sworn as a witness a little earlier this afternoon.
A. Pardon?
Q. You were sworn as a witness earlier?
A. Yes, sir.
Q. Please state your name for the Court.
A. Max Lutz.
Q. And where do you live, sir?
A. McAllen.
Q. What business are you engaged in?
A. In the growing and shipping of produce.
Q. How long have you been engaged in that business?
A. About fourteen years.

Q. That is known as the Max Lutz Company, is it not?

A. That's right.

Q. In that business, do you buy various types of bagging, including polyethylene bagging?

A. That's right.

Q. What do you do with the polyethylene bags that you buy?

A. Put carrots in them.

Q. Put carrots in them?

A. Uh huh.

Q. Do you run a substantial volume each year?

A. That could be answered one or another. It is debatable. I don't know what you mean by "volume".

Q. All right, have you ever met the defendant, Fred Meyer?

A. Yes, sir.

Q. And do you know Fred Vahlsing, Senior?

A. I met him today for the first time.

Q. Have you talked to him on the telephone?

A. Yes, sir.

Q. State the occasion you met Fred Meyer.

A. Oh, it was sometime in the spring of '55, I don't recall what month it was. I think it was the early part of '55. I met Fred Meyer at a dinner party, at a friend's home.

Q. Could it have been in '54?

A. It could have been the end of '54, I am not sure.

Q. And what was that man's name?

A. Sam Lack.

Q. Did you and Mr. Meyer have a conversation that night at the dinner party?

A. I don't recall any specific conversation, met him for the first time and I think somebody there at the party said I was in the produce business, I don't recall who it was, and Mr. Meyer was representing Texas Plastics and that could be we may get together. Who it was that did the introducing of that matter, I don't recall.

Q. Now, Mr. Lutz, I can lower my voice if I am talking too loud for you; if you would rather for me to speak up, I will continue to do so.

A. Well, I would rather. I am a little hard of hearing.

Q. All right, sir, then did you make an appointment to meet with Fred Meyer after that dinner party?

A. Nothing specific. I think Fred said that he may see me the next day, or thereabouts, or see me at my office.

Q. And did he do so?

A. Yes, he did.

Q. And what did you talk about?

A. Oh, produce business in general, and bags, if I was interested in purchasing any.

Q. You were talking about polyethylene bags?

A. Yes, sir.

Q. What did he tell you about buying polyethylene bags, if he talked about that?

A. Oh, more or less like every other salesman does, they have got the best and somebody—always something wrong with somebody else's, everybody trying to sell their product.

Q. Did he ever mention Harry Borak and Roto-Lith in connection with selling polyethylene bags?

A. I don't remember whether Fred Meyer mentioned it or I did myself. I think we discussed several competitors in the business.

Q. But Harry Borak and Roto-Lith was mentioned?

A. Harry Borak was mentioned. I don't recall who mentioned the name.

The Court:

You mean you don't recall who brought it up?

A. That's right, sir.

Q. Well, if he brought it up, what did he say about them?

A. He said in his experience with the shortage of bags, the experience that he had, some bags that he had seen in New York, or I don't recall whether he said he was working for or connected in some way, shape or form with F. H. Vahlsing.

Q. Now, is that all he said?

The Court:

In some way, shape or form, what?

A. There was a shortgage of bags in the individual containers.

Q Now, is that all he said to you?

A. Well, Mr. Abbott, I don't recall the exact conversation, word for word.

The Court:

The substance of it is all that is asked for, Mr. Lutz.

A. Sir?

The Court:

The substance of it is all he wants.

A. He said there was a shortage of bags and I think I asked him how he knew it, I think I asked

him how he knew there was a shortage of bags and he said that he had—either he had counted some or the Weight and Measures, or both, I think both, either counted some—and the Weight and Measures Department of New York had counted some, and they had found them to be short, and there was something between the Vahlsing Company and Roto-Lith Company, there was some suit involved, one against the other or—whether it was settled or—I didn't—it really wasn't important and I didn't go into details, wasn't interested.

Q. You didn't pay much attention to it?

A. I paid no attention to it, for the simple reason that it was of no interest to me whatever. I was looking for the best merchandise at the lowest price I could buy it.

Q. Now, is that all he said to you?

A. As far as I recall, yes.

Q. Now, with relation to Harry Borak and Roto-Lith, is that the limit of what he said to you?

A. To the best of my recollection, yes, sir.

Mr. Abbott:

I would like to approach the bench, Your Honor.

The Court:

I don't want—I don't see any occasion for approaching me, or approaching the bench. Now, you are under oath, Mr. Lutz,—

A. Yes, sir, Your Honor.

The Court:

—and I will let you—if you plead surprise, I will let you—

Mr. Abbott:
That is my purpose, Your Honor.

The Court:
—lead him and see if he—

Mr. Abbott:
I would like to plead surprise and—

The Court:
All right.

Mr. Abbott:
—have the right to cross examine him.

The Court:
I assume you are surprised, since you made an allegation, a specific allegation, in much stronger language than that, that he is supposed to have used in talking to this witness, that Meyer is supposed to have made stronger statements than that to this witness, you have got that in your petition. You may lead him, if you wish, and see if you can refresh his recollecion.

Mr. Abbott:
All right, sir.

Q. Now, Mr. Lutz, I would like to recall to you a conversation with me in February, 1955, at the offices of Ewers, Cox and Toothaker, in McAllen, Texas.

Mr. Wagner:
Now, Your Honor, I don't know what this is leading to but I am going to object to counsel, who are this.

man's retained attorneys, attempting to impeach the man on statements that he made to his own attorneys.

The Court:

I am not permitting him to impeach him yet. I am permitting him to refresh his recollection and I overrule the objection.

Q. At that time, did you tell me that—

Mr. Wagner:

Does the Court hold that he has a right to interrogate his client—

The Court:

I hold that he has a right, when he tells me, in good faith, that he is surprised, he has a right to attempt to refresh this witness' recollection, yes, sir, and I am interested myself, the Court is interested, when a petition is filed in here and alleges that people made certain statements to certain people, and then the man to whom it is alleged to have been made comes in and says that he can't remember anything more than what this witness remembers. I am interested in knowing why it was put in that petition, I am interested in knowing why the witness doesn't remember it. Now, it is all clear. You have your exception. I have ruled.

Q. Do you recall making a statement to the effect that—not to the effect, but in the words that Fred Meyer had called upon you to sell you bags?

A. That's right.

Q. And that during the course of the conversation, that he told you that Roto-Lith and Harry Borak were crooks?

A. No, sir, that is not true.

Q. You do not recall telling me that?

A. No, sir.

Q. And that they were—

A. I didn't tell you that, Mr. Abbott, and if I may say to the Court, you showed me this paper here, I had a conversation with Mr. Cox and yourself, in Mr. Cox' office, I didn't know you were there, and Mr. Cox asked me to come down and talk to him, and I did. After I was there about ten minutes, you came in and started making notes. I don't recall whether it was two or three or four days later, you came into my office and put a paper on my desk—I don't recall whether it was two days or three days or a week—and said, "Sign this." I looked at it, and, Mr. Abbott, I told you right then and there that that was not the things I said, and you can't deny that, that is exactly the—and you said, "Well, you change it to what you did say," and I told you I would when I got time and that was the last I heard from you.

Q. Mr. Cox was present, then, during the conversation?

A. Yes, sir, he was.

Q. And he is an attorney in our office, in McAllen, Texas?

A. That's right, sir.

Q. All right, but I told you, when you put that paper on my desk, Mr. Abbott, that that isn't what I said. Is that right or not?

Q. Now, are you referring to the paper that I have in my hand?

A. I am referring to the paper that—you did put a paper on my desk. I don't know what paper it is.

Mr. Abbott:
I would like to refresh his memory, Your Honor, by showing him—

The Court:
All right, I will let you.

Mr. Abbott:
—a paper that is marked "Rough draft".

A. I couldn't say whether this is the exact paper or not, but it was a paper of writing similar to this, you asked me to sign. I don't recall whether it was the exact one or not. I made no important issue of it.

Q. As a matter of fact, wasn't it that you were too busy at that time and you would look it over and if there were corrections, you would make them?

A. No, sir, you asked me if I would sign it and I looked at it and said, "This isn't what I said, Mr. Abbott," and you said, "Well, will you correct it as to what you said?" And I told you, "I may, when I get time," that I was busy.

Q. Now, Mr. Lutz, do you recall telling me that Fred Meyer said that Roto-Lith and Harry Borak were crooks and would short count you and that in the end, you would "wind up paying more to them than you would to me"?

A. He said they were short of bags and it was a the word "crooks" to me.

Q. Did he tell you—did you tell me—that they would do that to other customers, that they were cheap chisellers or crooks or something of that kind, whatever it was?

A. He didn't use the word "crooks."

Q. What did he use?

A. He said they were short of bags and it was a chiselling way of doing business; he may have said something similar to that. Mr. Abbott, I didn't make any important issue of it, it didn't really mean any thing at the time, for me to—

Q. Just answer the question, sir. Did Mr. Meyer tell you that they had had to sue Roto-Lith and Harry Borak and had collected a judgment?

A. He said there was some suits *filed* between Roto-Lith and Harry Borak and Vahlsing, and Vahlsing and Harry Borak, but I really didn't pay any attention to—

Q. My question was, do you remember telling me that Fred Meyer told you that they had had to sue Harry Borak and Roto-Lith to get their money back?

A. No, he said, perhaps, they were suing Harry Borak or Roto-Lith, and Roto-Lith—Vahlsing was suing Roto-Lith, both were suing one another, but I don't think that—to the best of my recollection, that he said what the outcome of the case was, except that it was settled.

Q. Now, did he say anything to you about this case had gone before the Bureau of Weights and Measures and they had been fined?

A. He said it went before the Bureau of Weights and Measures, yes. I don't remember—I couldn't say "Yes" or "No," sir, whether they were fined or not; I really—it was insignificant to me, because I wasn't interested in Vahlsing or Harry Borak in any way except maybe purchasing some bags from them.

Q. Now, Mr. Lutz, on that occasion, also, in the office, did you tell me of a subsequent conversation that you had with Fred Meyer relating to Harry Borak and Roto-Lith?

A. I don't know what you are referring to, sir.

Q. All right, sir. Do you recall that you bought bags through Lone Star and Texas Plastics and various other manufacturers at that time?

A. Oh, at that time, I bought bags from—

Q. Just answer my question—

A. Yes.

Q. —"Yes" or "No,"—

A. Yes.

Q. —please.

A. Yes.

Q. And did Mr. Borak call on you on or about February 11, 1955? Just in that vicinity.

A. Yes, he called on me. I don't recall the date, but—

Q. Did he ask you for an order for some bags?

A. Yes, sir.

Q. And did you give it to him?

A. I did.

Q. And then did you call Fred Meyer and cancel the existing order that you had in his plant, or cut off the delivery, at a certain date?

A. No, sir, I didn't do my purchasing through Fred Meyer.

Q. Well, did you call Lone Star and tell them to cut it off at a certain date because you had bought bags elsewhere?

A. No, I took my full commitment.

Q. Sir?

A. I took my full commitment that I had ordered.

Q. Yes, sir, but you had a cut-off date, didn't you?

A. No, we buy bags in the million lots, or whatever it may be, and I took my full order.

Q. All right.

A. I made no cancellation.

Q. Did you inform Fred Meyer that you had bought —how many bags was it, from Roto-Lith?

A. I don't recall, offhand. Several million.

Q. Close to three million bags?

A. Sir?

Q. Wasn't it three million bags?

A. It was several million. I don't recall just what it was.

Q. And you told Fred Meyer about that?

A. No, I don't remember whether I did or not.

Q. Did Fred Meyer come to your office to see you after that, immediately, or shortly after you placed that order, and do you recall telling me at that time that he made substantially the following statement,—

Mr. Wagner:

Now, wait a minute. I am going to object to the form of the question. That isn't the form—the question here is whether Fred Meyer came to him and said certain things, not whether he went to tell Mr. Abbott something.

Mr. Abbott:

All right, I beg your pardon, sir.

Q. Did Mr. Meyer come to your office shortly after you ordered the bags from Roto-Lith?

A. I think he was by one evening, yes, down at the packing house, came by one—

Q. And he was informed—

A. —evening.

Q. Pardon me. Were you through?

A. Pardon?

Q. Were you through there? I don't want to interrupt you, sir, when you are talking. I think I did,

and I want to apologize for it. Were you through with your statement?

A. Well, I think so. I think I answered the question.

Q. All right. He came by to see you a night or two or three after you had placed the order with Mr. Borak?

A. I don't know as Mr. Meyer came to see me specifically. He had been at the shed many times when I wasn't there, or many times that—Mr. Meyer —or other people, competitors, selling packages, would be in the packing house and looked around, and I mean without any specific appointment or anything,—

The Court:

Well, he was there, is that what you are saying, he was there, whether he came to see you or not?

A. That's right.

The Court:

All right.

Q. Well, did you talk to him?

A. Yes, sir.

Q. And did he make to you substantially the following statement, "You made a big mistake buying bags from Harry Borak. I told you he is a crook and that we had to file a suit. I have the proof and I can show you." Now, did you report that statement to me in my office in McAllen?

A. I did not, sir.

Q. You did not?

A. No, sir. I may have reported that—told you about Harry—Fred Meyer being there and discussing

Roto-Lith, but it was never my recollection that Fred Meyer or anybody connected with the concern called Mr. Borak a crook.

Q. Well, what did they call him, then, on your recollection?

A. They just said the bags were short and they may have called him a—a chiselling way of doing business, or unethical or something to that effect, but, Mr. Abbott, I don't ever recall of anybody that ever did call him a crook.

Q. Well, now, let me ask you another question, Mr. Lutz. As a matter of fact, didn't you call Mr. Borak in New York City, or Mr. Fred Stone, in Weslaco, about this matter?

A. That I what?

Q. Didn't you call, on long distance, either Mr. Fred Stone in Weslaco or Mr. Harry Borak in New York City, about this conversation that you had with Fred Meyer?

A. Mr. Harry Borak knew about this conversation at the time he was down here at the date you mentioned.

Q. Just answer my question, did you not call him on the telephone?

A. Well, I can answer the question that Mr. Harry Borak called me on the telephone.

Q. All right, and what did he say to you?

The Court:

Wait a minute, before that, did you call Mr. Stone, before he called you?

A. I don't recall calling Mr. Stone. I have called him at several occasions, but I don't recall calling him for any particular occasion, Your Honor.

The Court:
Well, you say Mr. Borak called you?

A. Yes, sir.

The Court:
Well, didn't he tell you that Stone had called him and said you had called Stone and that was the reason he was calling you?

A. No, Mr. Harry Borak called me from New York and he knew about the conversations that was made by Fred Meyer when he was here and he said he had seen Fred Meyer when he was here and he thought it was all settled and then he had heard some other remarks and he would like to file suit against Fred Meyer and asked me if I could recommend an attorney and—

Q. Now,—

A. —I told him I was using Ewers—I recommended Mr. Franklin Ewers, and they are—I presume they got in contact there.

Q. Now, as a matter of fact, in this last statement that you just made, you said that he already knew about the statements that Meyer had said.

A. That's right.

Q. Who told him?

A. I told him.

Q. All right.

A. Because when I bought—before I bought their bags, I told him that I had heard there was a shortage in his bags, "Any truth to it?"

Q. All right. Just a moment. Then he called you from New York City?

A. That's right.

Q. And he had heard additional statements. Where did he get that report from?

A. I don't know, sir.

Q. Now, as a matter of fact, Mr. Lutz, you gave it to him, didn't you?

A. No, sir, I don't recall. I never called Harry Borak. He asked me—he knew when he was in my office, just what he said, there was a shortage in bags, Mr. Abbott.

Q. As a matter of fact, you suggested to him that he file this lawsuit?

A. I'm sorry, I did not suggest anybody file a lawsuit.

Q. That Fred Meyer had come back after they had shaken hands and it was all over and had repeated them, after you had bought bags from him, and had repeated the statements, and you got worried, isn't that right? Isn't that what you told me, Mr. Lutz?

A. No, I don't recall any conversation of that kind at all. It wasn't important enough for me to even think about it.

Q. Well, sir, I know it has been a long time ago, Mr. Lutz.

A. That's right.

Q. And I don't want to belabor the point.

A. Sir?

Q. I don't want to belabor the point, I just want your best recollection, if you didn't make substantially the statements to me that are in this petition.

A. I did not, sir. I didn't see the petition. I didn't write it. I made no—

Q. You haven't even seen the petition?

A. I made no other statements than what I have told you, Mr. Abbott, to the best of my recollection.

I wasn' running Mr. Borak's business, Roto-Lith, or Mr. Vahlsing. I had my own troubles to take care of.

Q. Now, when you talked to Mr. Borak on the telephone, when he called you and said, "What is this about the new stories that are going on down there?" You recall that conversation, don't you?

A. He called me and he said he had heard other stories and he had made up his mind to stop them, therefore he was going to file suit, and asked me if I could recommend an attorney. I told him I was using Mr. Franklin Ewers.

Q. Now, at that time, you wanted to cancel, or you were worried about the order for three million bags that you had placed with Mr. Borak, weren't you,—

A. No.

Q. —and wanted to cancel that order?

A. No, sir.

Q. Or you thought you—you wanted to discuss it further?

A. I beg your pardon, Mr. Abbott. I never asked to cancel them, or didn't cancel them.

Q. Did Mr. Borak offer to have Mr. Vahlsing call you and tell you that the stories were untrue?

A. If he did, I don't remember. It was immaterial. I didn't order to cancel it, I had never offered to cancel it, I signed the confirmations of the order and accepted the bags; I never canceled any order that I placed for merchandise, from anybody, any time, anywhere.

Q. Well, I want to be clear on this, I want to find out the extent of your testimony. You say that you did not call—that Mr. Meyer did not call Mr. Borak, or his company, crooks, or cheap chisellers?

A. Not to me.

Q. Not to you, and you wouldn't have repeated that to anyone else?

A. Sir?

Q. I say, because Mr. Fred Meyer didn't ever say them to you, then you wouldn't have ever repeated that to anybody else, is that correct?

A. To the best of my recollection, I don't recall—I don't know what you are referring to, Mr. Abbott.

Q. Have you related to any other person other than—well, excluding Mr. Cox and I—what Mr. Meyer said to you about Roto-Lith and Harry Borak? I want you to search your memory for an answer to that.

A. What Mr. Meyer said?

Q. Yes.

A. Yes, there at different times, the salesmen for the Lone Star Bag Company would discuss pro and con about this shortage of bags, and really, I paid such little attention to it, it was really unimportant to me, that I couldn't quote the conversations, no matter what the situation would be. I just couldn't quote it, I wasn't interested in it.

Mr. Abbott:

Your Honor, may I have just one minute, please?

Q. Now, Mr. Lutz, passing over, for a moment, the alleged slander, if I may, did Fred Meyer come by your house and talk to your wife one night about this case?

A. I don't know whether he talked about the case. I wasn't home. He came by one evening and my wife said he was looking for me.

Mr. Wagner:

Now, just a moment.

The Court:
I sustain the objection.

Q. All right. Did he come to your office one evening to talk to you about it?
A. Yes, sir.
Q. What did he say?
A. He said that he was being sued by Roto-Lith and he was in trouble and he asked me my advice what to do. I told him I would give my advice on what to do, I said, "You go see Mr. Vahlsing, tell him the truth about whatever may have transpired, and work it out from there, and I am sure, if you told Mr. Vahlsing the truth of what you are being sued for, he would be very reasonable about it and he would rather hear it from you than somebody else."
Q. Didn't he tell you that he was going to lose his job, he would bet you a steak dinner that he would lose his job over this matter?
A. If he did that,—

Mr. Wagner:
Now, Your Honor, what is the materiality of this? I hesitate to intervene and make capricious objections,—

The Court:
Well, it could show—I will overrule the objection.

Mr. Wagner:
All right.

Q. Did that happen, Mr. Lutz?

A. I told him I thought that if he went and told Mr. Vahlsing the truth about what trouble he was in, I didn't think that he would be fired.

Q. Didn't he tell you that he had stuck his and Mr. Vahlsing's neck out?

A. I don't recall whether he put it that way or not. He says, I think, maybe, "I was in trouble," and maybe he says, "I talked when I should have been listening," and he says, "It can happen to anybody," but I don't recall the exact words, Mr. Abbott, I just don't recall, don't remember, didn't give it any importance. I knew he said he was in trouble and I told him to go see Mr. Vahlsing, he was the man he worked for, and go see him and tell him the truth and I felt sure he would work it out. I couldn't give him any advice other than to go see Mr. Vahlsing and tell him the truth.

Q. Now, Mr. Lutz, you and I had a disagreement about what was the import of this paper. You state that I wanted you to sign it and—

A. I don't know whether it was that paper, but you did lay a paper on my desk and asked me to sign it.

Q. Well, a paper, then.

A. That's right.

Q. You did not sign it?

A. I did not, sir.

Q. Did I make repeated requests that you give an affidavit as to what you told me?

A. You asked me to give you a deposition once or twice.

Q. I am talking now about an affidavit.

A. I don't recall you asked for an affidavit. You asked for a deposition.

Q. All right, sir. Now, I did ask you for a deposition?

A. That's right, sir.

Q. Tell me what happened then?

A. I told you I would appear in Court as a witness, I didn't want to sign any deposition.

Q. Well, what did you do?

A. Nothing.

Q. You didn't do anything?

A. No, sir.

Q. Did you transmit that information to me alone, that you didn't want to give a deposition, or to someone else?

A. I transmitted it to Mr. Franklin Ewers.

Q. Now, let me ask you this question, did you, at that time, tell me that you did not want to give a deposition because an employee of the Vahlsing companies, operating the precooling plan at Edinburg, had called upon you and you wouldn't be able to get your lettuce precooled and cost you thousands of dollars to testify in this case?

A. No employee from the Vahlsing company ever called me.

Q. You didn't tell me that?

A. I didn't say an employee called me, sir. No employee ever called me, from the Vahlsing company.

Q. Call on you. Is there a distinction?

A. They didn't call on me.

Q. Sir?

A. They didn't call me or call on me. I did tell you, Mr. Abbott, that it is possible that they may call on me, but I didn't say that they called on me, and they did not call on me, nor did they call on me or were present. Mr. Abbott, you know I said

they may call on me, it could develop, I told you I didn't know, but nobody has called on me and nobody has ever—

Q. No one has, that is the facts, yes, sir, but I am trying to find out what you told me as the reason you could not give the deposition.

A. Mr. Abbott, you and I talked about this thing pro and con about five minutes, hit and run, when you would run up to Elsa five minutes or I would come in and see Mr. Ewers, and see you five minutes in your office, and I just don't recall those technical conversations that you put down a note of, I had no secretary with me.

Q. All right, sir. Now, who are you buying bags from this year?

A. Who am I buying bags from?

Q. Yes, sir.

A. I am buying bags from the—some from the DuroPac Manufacturing Company of Baltimore and some from the Texas Plastics Company.

Q. Who are you buying the bulk of your bags from?

A. Texas Plastics Company.

Q. Are your accounts with them current or is there an outstanding indebtedness to the Texas Plastics?

A. I think my account is pretty current.

Q. You think it is pretty current. Do you know with any definiteness just where it stands?

A. No, I don't.

Q. I see. How long has your account been current, Mr. Lutz?

A. Well, my bookkeeper takes care of that and I really haven't watched, the last two or three weeks we have been busy on other commodities and—I presume if it wasn't satisfactory, I would have had some call.

Q. Would it be possible to get the information as to what your books show?

A. Well, I presume so, I think Texas Plastics Company have them, or my office have them.

Q. Would you furnish that to us?

A. Sir?

Q. Would you furnish that information to us?

A. Well, if I am requested to do so by the Court, I presume I would have to.

The Court:

I believe I will ask you to furnish it in writing. I believe I will ask you to furnish it in writing, about the state of your account as of this date, not tonight, but right now, I want a letter on it.

A. All right, sir, you may have it.

The Court:

You may address the letter to the Clerk of the Court,—

A. All right, sir.

The Court:

—United States District Court. Anything else?

Mr. Abbott:

No further questions, Your Honor.

The Court:

Cross examine.

Mr. Wagner:

Mark this, please, sir.

(Conference between counsel and the Clerk, out of hearing of the reporter.)

Cross Examination.

By Mr Wagner:

Q. Mr. Lutz, I will had you a document that is marked D-5, which purports to be—

Mr. Abbott:

Your Honor please, we have been—I have objected to this document before. It is a—do you mind if I make this objection at this time?

Mr. Wagner:

No.

Mr. Abbott:

It is a suit in which Mr. Lutz and Mr. Borak are involved at the present time I don't think it is admissible, relevant or pertinent to any issue in this case.

The Court:

I will overrule the objection It may throw some light on this witness' attitude at this time.—

Mr. Abbott:

Yes, sir.

The Court:

—affect his credibility, show his interest in the outcome of this case.

Q. Mr.—

The Court:
Why don't you summarize and ask him if it isn't a fact. It is cross examination.

Mr. Wagner:
All right, Your Honor.

The Court:
I believe you can shorten if if you will do that.

Q. You stated that you thought your order to Roto-Lith in 1955 was about three million bags. Now, for the purpose of refreshing your recollection,—

Mr. Abbott:
Now just a moment, sir. I believe his testimony was that his first order was about three million bags.

Mr. Wagner:
All right, the only thing in here is about three million bags, is what I am talking about

The Court:
It is cross examination. Let him go ahead.

Q. Now, I have here a copy of the counter suit you filed against Roto-Lith in Edinburg and it alleges—uses the term, "5,286,550," of these bags. Did you buy that much from Roto-Lith?

A. Yes, sir.

The Court:
Now, wait a minute, counsel. Let's get, first, did somebody sue you?

A. Yes, sir.

Mr. Wagner:
Yes, sir, Roto-Lith sued him.

The Court:
For what?

Mr. Wagner:
For a debt.

The Court:
For what?

A. For bags.

Mr. Wagner:
Well, I don't know about it,—

The Court:
Well, I want to get it clear. There is no sense in having part of it in here. Did you get sued by Roto-Lith?

A. Yes, sir.

The Court:
For what?

A. For bags.

The Court:
On your account?

A. Yes, sir.

The Court:
All right, and then you brought a counter-suit that he is talking about now?

A. Yes, sir.

The Court:
All right.

Q. And in this counter-suit, you claimed that you were short counted $11,311.97 on your purchase from Roto-Lith, do you not?

A. I think my attorney figured out percentages. I didn't have nothing to do with the figuring of the—

Q. Now, here just a few weeks ago—here just a—I will try to get a date here in a minute, but do you recall having a conversation with me and your attorney in that Edinburg suit, Mr. Carl Judin, in McAllen, here just a few weeks ago?

A. The time that I gave a deposition, I believe,—

Q. Yes.

A. —the first time, in Edinburg.

Q. Your deposition was being taken in your attorney's office, Mr. Judin's, one afternoon, was it not?

A. Thats right.

Q. And I came up there and waited 'til they finished with your deposition and you and Mr. Judin and I had a conference, did we not?

A. Just a few minutes, yes.

Q. And at that time, you told us that you had some twenty three or twenty four—

Mr. York:

If the Court please, we object to any conversations between Mr. Wagner and Mr. Lutz down there at the—

The Court:

Overruled.

Mr. Wagner:

This is just background,—

The Court:

Overruled.

Mr. Wagner:

—it doesn't amount to anything.

The Court:

It is cross examination.

Q. You told us you had something like twenty three or twenty four original Roto-Lith cartons, unopened, still in your possession, did you not?

A. That's right, sir.

Q. And I sought to make arrangements with you so that I could have some laboratory count those boxes, did I not?

A. Yes, sir.

Q. Under an agreement that whatever this laboratory came up with, the evidence would be available to me in this suit and to you in your suit?

A. That's right.

Mr. York:

May it please the Court, this is not matter that was gone into on direct examination. If Mr. Wagner

wants to call him in the middle of his case, which we think would be more appropriate,—

The Court:
Overruled.

Mr. York:
We haven't gone into any of this—

The Court:
Overruled.

Mr. York:
We haven't gone into any of this he is talking about.

The Court:
Overrule the objection. I never have followed that rule. When a witness gets on the stand, he is subject to cross examination on all subjects.

Q. And sometime subsequent, were you at your plant when Mr. Judin and the man from Pattison's Laboratories came in and picked up the cartons, or was someone else there?

A. I was there in the office. I knew the man from the laboratory. Mr. Judin was there and I paid no attention to what they were doing, they just—I don't know, doing something, giving a receipt for the bags, and picked up the bags, and I saw them there and I don't know when they left, but it was during that morning.

Q. Do you know whether those boxes were still in the condition they were in when you received them from the freight carrier? Had they been opened?

A. That is my opinion, they were exactly the way they were received.

Mr. York:
We object to an opinion of the witness.

The Court:
I sustain the objection. If you saw them and—did you open them yourself?

A. No, sir, because they were sealed, just like they came in from the express company.

The Court:
All right, I will let that stand, but not your opinion.

Q. Now, in addition to those boxes that were sent down to Harlingen, I will ask you if Mr. Abbott didn't come over there and open a box and count it himself?

A. Mr. Abbott discussed the shortage of bags at one time, picked up two boxes at my office, unsealed,—sealed boxes of bags, two boxes.

Q. Was he by himself or was Mr. Toothaker with him?

A. No, I think he was by hisself when he picked up the boxes.

Q. Did he initial—you don't have those boxes with you that Abbott counted, do you? You don't have them down here now, do you, or—

A. No, I have no—no way to get them here.

Q. All right. You don't know whether they found them short or not?

A. Yes, sir, I do. I asked Mr. Abbott to count them and please put the count on the boxes and initial them and he said he would do so.

Q. And did he do that?

A. Yes, sir, he did.

Q. And it showed substantial shortages in both boxes?

A. Yes, sir.

Q. Now, about this conversation of yours with Mr. Meyer, in which he told you about Vahlsing getting short counted, that was before you made your contract with Harry Borak, wasn't it?

A. Yes, sir.

Q. And that didn't impress you sufficiently to prevent you from going on and buying five million bags from the man?

A. No, sir.

Q. Didn't Mr. Borak come to see you too, just night before last?

A. Mr. Borak came to see me—I don't recall, last Friday or Saturday, at my office.

Q. And he was—

Mr. York:

Your Honor, I would object to the line of questioning regarding the negotiations between Mr. Borak and Mr. Lutz unless some materiality is shown to them.

The Court:

Well, I don't know what he is going to ask him. I will have to judge on the questions asked. It is cross examination. Go ahead. Let's see.

Q. And he came to see you in an effort to settle your Edinburg litigation before this case went to trial?

A. He called me, asked me to come up and see me; I told him he certainly may, and he came up and we discussed—oh, the birds and the bees, and Mr. Borak asked if I was angry at him, I said I

certainly wasn't. He said, well, he wasn't angry either and he would like to settle the case we were suing one another on, and asked what basis I would like to settle it on, and I told Mr. Borak—

Mr. York:
If the Court please,—

A. —that he had started it,—

The Court:
Wait a minute.

Mr. York:
—the settlement negotiations can't possibly have any materiality, can they? I mean, the Court favors—

The Court:
Unless you can show—I don't think this is material on the present case at all, counsel.

Mr. Wagner:
I don't care to go into detail.

The Court:
If you can show some improper advance toward him, that would be a different thing, but I don't think it has any bearing on this case, so far. Anything else?

Mr. Wagner:
That's all, Your Honor.

The Court:
All right, you will be excused, sir.

Mr. Abbott:
I just have one question, Your Honor, if I may.

The Court:
All right.

Re-Direct Examination.

By Mr. Abbott:

Q. Mr. Lutz, do you recall that I have talked to you about this case, time and time again, over the year—over the past year?

A. At times, yes.

Q. And we never had any falling out as to your lack of memory about the acts up until just recently, did we?

A. I never had a lack of memory that if I knew what transpired, Mr. Abbott, I would say so, but I never—if I would take—try to keep in mind of all the complaints that all processors have about one another, why, they would all be suing each other in the whole United States.

Q. Now, Mr. Lutz, at the end of the 1955 season, how much money did you owe Harry Borak?

A. At the end of the season or what I owe him now?

Q. What you owed him then.

A. At the end of the '55 season. Uh—

Q. Your invoices were due in February or March.

A. Well, let me think a minute, I think I can give it to you pretty close. It was around fourteen thousand five hundred, maybe a hundred more or less. Somewheres around there.

Q. And when did you make a payment on that?

A. I don't recall the date, but I gave Mr. Borak a check for $1,500.00.

Q. Well, now, wasn't that a check payable about December 15, 1955, some nine months later?

A. Well, it was payable in December. It was paid, there was one note payable, of $2,900.00, in December, and it was paid, and there was another note, $5,000.00, that was paid in January, sometime.

Q. As a matter of fact, that last note was due January 15th and you got an extension to February the 2nd on it, didn't you?

A. I don't—it was a few days. I don't recall.

Q. And then another note fell due for another $5,000.00 and that is the subject matter of this present suit?

A. That's right.

Q. You did not pay the note, did you, on February 1st, did you, for $5,000.00?

A. I paid all the notes except the last $5,000.00.

Q. And that is the one he sued you on?

A. That's right.

Q. And he sued you on February 1st—in February of this year, didn't he?

A. I don't recall. I think it was after that, Mr. Abbott. I am not sure. The records speak for themselves.

Q. Who represents you in this suit in which you are defendant, by Mr. Borak, against Max Lutz?

A. The attorneys representing me?

Q. Yes.

A. Stafford, Atlas and Spilman.

Q. And who is handling the suit?

A. Mr. Judin.

Q. Is Mr. Judin in the Courtroom?

A. Yes, sir.

Q. Would you point him out, please?
A. Sir?
Q. Would you point him out, please?

(Witness pointing and Mr. Judin standing.)

Q. All right. Now, he has been down here, present, since this case got started, hasn't he?

The Court:
I think you have gone far enough, Counsel.

Mr. Abbott:
All right, thank you, sir. I have no further questions at this time, sir. However, I would not want to excuse the witness.

The Court:
All right. All right, you may wait outside until they get ready for you.

Mr. Abbott:
Your Honor, I would like a drink of water. I seem to have a cold.

The Court:
All right.

(Mr. Abbott retiring from Courtroom and returning.)

Mr. Abbott:
Did I understand the Court to order the witness Lutz to give us a statement now, to the Clerk, as to the amounts—

The Court:
Not now. He will have to get back to his office, I guess.

Mr. Abbott:
All right.

The Court:
That is rather a side matter now, I think.

Mr. Abbott:
Sir?

The Court:
That is rather more for my interest and my information than anything else.

GERALD ALBERT LEVERMANN, having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Abbott:
Q. Please state your name for the record.
A. Gerald Albert Levermann.
Q. Where do you live, Mr. Levermann?
A. 110 Pecan, McAllen.
Q. And what kind of business are you in?
A. I am a salesman for Lone Star Bag Company in Houston.
Q. In what territory do you work?
A. Just the Rio Grand Valley.

The Court:

Known as Dutch Levermann?

A. Yes, sir.

Q. You used to be a football player?

A. Yes, sir, I did.

Q. Mr. Levermann, how long have you been employed by Texas Plastics?

A. About —

Q. I beg your pardon, sir, by Lone Star?

A. Two years March 15th.

Q. When did you meet Fred Meyer?

A. Oh, it must have been November or December of '54.

Q. Can you identify him—

A. Yes.

Q. —in the Courtroom?

A. Mr. Fred Meyer.

(Witness pointing and Mr. Meyer standing.)

Q. All right, what was the nature of that meeting?

A. We were going to be the sales representatives for Texas Plastics, which Fred Meyer was the manager of, and we had several meetings where he was going to teach us the business, because we were just getting into it and didn't know the first thing about it.

Q. And what was the nature of that instruction?

A. Well, we had several meetings at his plant; then we had one in Houston, where he showed us how bags were mad and measured and—how they were gauged for weight, and at that time, he told us—also pointed out how the public could be cheated; in other words, sometimes some salesman might come in and give the outside dimensions of a bag instead of the

inside dimensions, which would make quite a bit of difference, and you may get a heavier bag and not so much, or something like that.

Q. Did he refer to any company in particular? Did he refer to Roto-Lith and Harry Borak?

A. Yes, I believe he did, and the time when he mentioned something about when they went to Court up in New York or somewhere, I just don't remember, because I wasn't interested at the time, on—oh, that they had claimed that Roto-Lith had shipped them bags and they had went to Court with it, and I never did ask him whether the case—how it came out, because I just didn't care.

Q. Did he tell you that they had sued Roto-Lith?

A. Well, I don't know whether he used the word "sued" or not, but he said they went to Court, I believe, is the way he put it to me.

Q. Went to Court?

A. Yes.

Q. And then did you meet Mr. Meyer down in the Rio Grande Valley?

A. Oh, yes, several times.

Q. Did you work with him?

A. Yes, I was in the plant several times, because I wanted to learn how the bags were made, and a few selling points, because I didn't know anything about it, and I saw Fred quite a few times.

Q. And you had conversations with him at that time about Roto-Lith and Texas Plastics?

A. Yes.

Q. You did a pretty good selling job down here, didn't you, in the early part?

A. Well, we had to get started. We did pretty good for a little while and then our competitors were undercutting our price, which we couldn't sell—I mean

I couldn't sell to the public, like I would sell my own product, for Lone Star, because it was someone else's product, and when someone else cut the price and we had to cut lower—

Q. Did you ever talk to Mr. Meyer about that?

A. Yes, and—

Q. What did he say?

A. Well, he said that we just wouldn't cut the price and that we were going to run into a bunch of—I think the words he used were "cheap chisellers," along the line, that we would probably be able to build still a cheaper bag and still hold the product.

Q. Now, who did he refer to when he was talking about that?

A. Well, I guess, in a round about way, probably Roto-Lith, because the reason I say that is because of the case where they had—I mean he brought it up several times to where he referred back to the case of the short bag count in the boxes that they had received from Roto-Lith.

Q. Did he ever talk to you about the Bureau of Weights and Measures and they had been fined up there?

A. No, I don't believe he said that they were fined. He did say that they were—that they called in the Weights and Measures firm, whatever you want to call them, and that they did find that Roto-Lith had shorted them on so many thousands of bags, I don't know the count, but that they were short.

Q. It was a very serious matter, wasn't it?

A. Yes.

Q. He volunteered this information to you?

A. Oh, yes.

Q. You never did request—

A. No.

Q. —him to tell you about it? Did he ask you to go out and call on customers and tell them that it would cost more to deal with Roto-Lith in the long run than it would from you because of the short count and so on?

A. I don't believe he said it in that way. He didn't ever, I don't believe, come right out and say Roto-Lith. He said that we would go out and find that we would run into concerns or the cheap chissellers that would be able to beat us in a price and we just wouldn't under-bid.

Q. Most of his conversations, however, related to Roto-Lith when he was talking about price cutting and—

A. Yes, I believe so.

The Court:

At any time, did he refer to them as a crook, or crooks?

A. No, sir, I don't recall that at any time he used the word "crooks;" the main two words he used were "cheap chisellers."

Q. Did he suggest that they would do this in the future with other customers, they would cheat them by short count?

A. Yes, I believe he did.

Q. That is your best recollection?

A. Yes, it is.

Q. Now, your understanding of this total conversation was that Roto-Lith would cheat the customers?

A. Yes, I—

Mr. Wagner:

Now, Your Honor, I am going to object to his understanding. This is a libel and slander suit—

Mr. Abbott:
I withdraw the question.

Mr. Wagner:
—predicated on certain allegations—

Mr. Abbott:
Withdraw the question.

The Court:
All right, he has withdrawn it. It is a slander case.

Mr. Wagner:
Slander, I mean.

Mr. Abbott:
I have no further questions.

Cross Examination.

By Mr. Wagner:

Q. Mr. Levermann, during the time that you had these conversations with Mr. Meyer, Lone Star was the exclusive sales representative of Texas Plastics, was it not?

A. Yes, sir.

Q. And these conversations that he had with you, he was attempting to help you do a more efficient, or as efficient a selling job as you could, on his bags?

A. That's right. I believe he tried to point out that we would run into people where they would underquote us on the price and—

Q. He was giving you arguments?

A. —and give us arguments, how to get around them, and just show us what some of the competitors

would do, and of course we took it all in, because, like I say, we didn't know the first thing about it, and we were trying to learn.

Q. They were business discussions that you were having?

A. Yes.

Q. Discussions with reference to the business operation?

A. That's right, sir.

Q. Lone Star is no longer the exclusive sales representative of Texas Plastics, is it?

A. No, sir.

Mr. Wagner:
That's all.

Mr. Abbott:
I have no further questions.

The Court:
All right, you are excused, sir.

The Witness:
Thank you, sir.

EDD BOLER, having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. York:

Q. Will you state your name, please, sir, Mr. Boler?

A. Pardon?

Q. Will you state your name, please?
A. Edd Boler.
Q. And what is your business?
A. Ship fruit and vegetables.
Q. Where do you operate?
A. Pharr, Texas.
Q. What is the name of your plant there?
A. Boler Fruit and Vegetable Company.
Q. You sell a substantial volume of fruits and vegetables, do you?
A. Yes, sir, I do.
Q. And do you handle your vegetables packed in polyethylene bags?
A. Why, part of them.
Q. Part of them are?
A. Yes, I pack carrots and citrus in polyethylene bags.
Q. You are acquainted with Mr. Borak, the plaintiff in this case, are you?
A. Yes, sir, I am.
Q. And his company, Roto-Lith, Limited?
A. Yes, sir.
Q. And you are also acquainted with Mr. Fred Meyer, the general manager of Texas Plastics?
A. Yes, sir, I am.
Q. Where did you meet Fred Meyer, Mr. Boler?
A. I believe I met him in my packing plant at Pharr.
Q. What was the occasion of his coming to your plant?
A. To sell me polyethylene bags for carrots.
Q. Did he sell you any bags?
A. Yes, sir. I might change that. He and—I can't recollect exactly, but he and—he either did, or he and Lone Star Bag Company, their representatives,

as I remember, they came together, and then he came alone a few times.

Q. They came together first, Mr. Fred Meyer and the representative of Lone Star Bag Company?

A. That's the way I remember it.

Q. All right, sir, and thereafter, Mr. Meyer returned by himself,—

A. That's right.

Q. —to your shed?

A. Not every time to sell me bags. He came by to visit and sell bags and just—

Q. All right. Now, in the course of these conversations, did he ever mention Mr. Harry Borak, the plaintiff here, or Roto-Lith, Limited, the corporation of plaintiff?

A. Yes, he did.

Q. What did he say about it?

A. Why, the answer is—I would rather you would pin-point that, more or less. He was by a good many times, and just what do you want, over the several occasions or—

Q. Yes, sir. Well, what was the first thing that you remember that he said about them?

A. Well, first, I bought a million bags from the Texas Plastics, or Fred Meyer, combined with Lone Star; anyway, I ordered a million bags from him.

Q. That was in early January, '55?

A. I believe that's correct, and they sold me these bags for $9.00 a thousand. At that time it was a rather attractive price on the market, and after I used a big portion of these bags and was ready to reorder, why, he raised the price to nine fifty, and they were very nice about it, they solicited my business, and I told them that—well, he told me that I was buying bags cheaper than his own—Mr. Vahlsing

was, himself, that I had purchased, and I was buying them cheaper than Vahlsing was.

The Court:
Well, wait a minute. You haven't told us about buying bags from anybody else. You say now that Meyer told you you were buying bags cheaper than Vahlsing was buying them?

A. Yes, sir.

The Court:
Wholesale?

A. Yes, sir, that's right.

The Court:
Well, what was the occasion for that, you had just bought a million bags from them?

A. Well, he was selling Vahlsing too, and he told me that he had sold me the bags cheaper than he would sell them to his own—the people that owned the plant, Mr. Vahlsing. That is exactly what he told me.

Q. Was it your understanding Mr. Vahlsing was substantially the owner of Texas Plastics, this corporation Mr. Meyer was representing?

A. That's right, I thought it was owned by Mr. Vahlsing, and he told me when he rasied the price that "I sold these bags cheaper than I would sell them to Mr. Vahlsing," which I understood was probably a vegetable company and a plastic company, but he told me that I was buying them a half a dollar cheaper, or something to that effect, cheaper than

he was selling to Vahsling, which Vahlsing was buying bags.

The Court:
I see.

A. Your Honor, is that what you wanted?

The Court:
Yes, I understand now.

Q. You are acquainted with F. H. Vahlsing, that is you know of him?

A. Yes, sir, I know Mr. Vahlsing.

Q. What is the nature of his business?

A. Well, I understand that he is principally in the fruit and vegetable business. Maybe not fruit now, but I believe he is a vegetable shipper, onion shipper, potato shipper, and as far as I know, owns Texas Plastics, and, in fact, I believe he is in the packing business also, and precooling, in Edinburg.

Q. All right, sir. Continue now. You say Mr. Meyer told you that he was selling—that that would be, if he sold you bags at that price, it would be cheaper than he was selling them to Mr. Vahlsing, for Mr. Vahlsing's own enterprises?

A. Well, what—yes. The thing of it is, I bought a million bags.

Q. Yes, sir.

A. I don't know if this has any bearing, but you wanted me to tell it, so—so I was ready to rebuy, and he had rasied the price to nine fifty, which was certainly all right, but he told me that the reason he had to, that I had bought bags actually cheaper than Mr. Vahlsing was buying them, or the way he

was billing it out, whatever it might be, so I told him, "well, even at the $9.00, I am not going to buy, because I have had a better offer from Roto-Lith Company of New York, Mr. Harry Borak has offered it to me," and as I recall, I had talked to Mr. Borak on the telephone and one of his representatives down here and they offered me what I considered a very attractive buy at a good deal lower figure than I was paying Texas Plastics, so I believe I bought two and a half million from Mr. Borak, and—well, I am getting this a little—the cart ahead of the horse—so in the conversation, why, Fred Meyer told me that even though I bought the bags for less money per thousand, that actually they would cost me more money because that they had an experience with Harry Borak and had actually checked it and he had shorted them on count, like they shorted the boxes, three thousand or five thousand to the carton, well, he told me that they had caught him shorting them on their shipments and had to sue him to recover a substantial amount of money, that he beat them out of it, and he told me that he thought the bags would be more expensive if I bought them from Roto-Lith than if I would still buy them from him at nine fifty, so—

Q. Now, Mr. Boler, when he said that they had to sue Mr Borak to get their money back, did he say anything about the outcome of that suit?

A. Well, I believe he told me they recovered a substantial amount of money. I don't think there was any amount mentioned.

Q. That he recovered a substantial amount of money?

A. That's right, but no definite figure. I don't know what "substantial" was, but a substantial amount of money.

Q. All right, proceed.

A. So—well, I bought these bags from Roto-Lith, I believe,—I can't remember the salesman's name, but he lived in Welasco, his first name was Fred something,—

Q. Fred Stone?

A. Yes, Fred Stone, he was calling on me, and I rather liked the guy, anyway, but the price was cheaper, so I bought it. I thought,—at the time I bought the bags, I felt—of course it was our impression that Roto-Lith was all right, and so I bought these bags, and they came in, and I can't remember whether it was—I believe it was after I had entered the order for the bags—well, as I remember, it takes about ten days to get them from New York, and in the meantime, well, Fred Meyer told me that—about this experience that they had had with Roto-Lith Company, that they had been shorted, and he told me that Harry Borak was a crook and a thief, or something of that sort, that I would, he believed, be shorted on my count, and that maybe the weight too, if I bought—I think, at that time, I was buying what we call a mill and a half weight; well, that more or less gives you the strength of the bag, in other words, you poke a carrot in it, why, it is a stronger bag, maybe, than a mill and a quarter, or a mill, and it was lower—like a mill and a half costs you quite a bit more than a mill and a quarter, well, it was his opinion that I would either get cheated on the count or the weight of the bag, so—

Q. You mean—did he say that?

A. Yes, that's what he said.

Q. You said that was his opinion. Did he say that?

A. Yes, that's right.

Q. All right, sir.

A. So he told me how to check them, that I could weigh the carton, like it has got three thousand pounds in it, I could weigh the carton and it would weigh if it had—in other words, you could count three thousand bags and it would weigh thirty pounds and a mill and a half, why, if it weighed twenty pounds, why, I probably wasn't getting a mill and a half bags, so when the bags came, then, why, I was—frankly, I was nervous, I thought maybe I was going to get hung, so I put some—I hired some girls, girls that worked in my shed, and I had them to go count them, to be perfectly frank about it, and the bags were from ten to forty bags extra in every box I counted. I didn't find any boxes short, and I did continue to check them because—we work on a very small percentage of money, I mean a nickel or a dime a crate, that about the kind of profit we make, so we can't afford to—we use from five to seven million bags a year; we can't afford to come up short or not get what we are paying for, so I have counted these bags a good many times, and up to now, I haven't found any shortages at all.

Q. Did Meyer, in his conversations with you, ever mention the Bureau of Weights and Measures in New York?

A. No, I don't think he did. I don't remember, I will say that.

Mr. York:

We have no further questions.

Cross Examination.

By Mr. Wagner:

Q. Who are you buying bags from now, Mr. Boler?

A. Right now, I have bought—originally—I will try to explain this so you will understand. Originally, this year, I bought my bags from Cordite Company out of New York City. No, it was—let's see. Macedo, maybe. You probably know them, but anyway, Cordite, they are all acquainted with them, I am sure. I think it was—anyway, it is New York. I bought two and a half million, with the option to buy two and a half million more, and they didn't deliver the bags to me, they were some three months late delivering, so I bought bags from—what we call a stock bag, just says, "Fresh Carrots," or something like that, on the bag, which we buy just from what we call shook houses, they have got just a standard bag that you can buy, so we bought a good many from these people, but they finally ran out, and we were paying a big premium for them because we—well, it is kind of like buying retail instead of wholesale. So then I got ahold of—no, he got ahold of me, I believe. Harry Borak had been in the Valley and he knew I had bought these carrot bags from one of his competitors and he knew the reason why, but I didn't get delivery on my bags, so, as I remember it, I think his salesman told him that—the problem I had, I was in real trouble, because we had carrots coming in, contracting them, and we didn't have any bags to put them in, so Harry Borak called me from Dallas, Texas, and he said that he would get me some bags from Nine Brothers, from Uvalde, Texas, which is a —I can't remember how many, but I think a hundred or two hundred thousand, maybe. Then he called

back again in two or three days and told me he would—asked me how I was getting along, and I told him I was really in a serious way, I was out of bags, and just almost being ruined on carrots, so he said, "Well, I have got four hundred thousand that belong to George Eby, of June Day Company at—" between Pharr and McAllen, and he said, "if it will help you, I will make arrangements for you to get those bags," which he did. I got, then, four hundred thousand from him. Then—I can't remember, I got some more from Gordon Butler at Alamo, and I can't remember whether Borak was—

Q. Well, I am principally interested in your relations with Mr. Borak.

A. Pardon?

Q. I am principally interested in your relations with Mr. Borak.

A. Well, he was getting—

Q. You have told us that your first order was for two and a half million.

A. That wasn't from Mr. Borak.

Q. Oh, it wasn't?

A. No, sir, that was from Cordite Company.

Q. Well, didn't you tell us a while ago that when Mr. Meyer came and told you that the price was going to have to go up fifty cents a hundred,—

A. Yes.

Q. —to nine fifty a thousand,—

A. That's right.

Q. —that you had received a very attractive order from Harry Borak,—

A. Offer.

Q. Offer?

A. Offer.

Q. Well, all right, offer from Harry Borak, and that you had bought two and a half—that you wouldn't

take Meyer's bags even if they were just $9.00. Didn't you—I mean I am just trying to bring you—

A. Yes, that is substantially what he said.

Q. Now, you went on then and said that you bought two and a half million and I gathered you had taken Harry Borak's very attractive offer. Am I incorrect in that?

A. No, sir, you are not. That is correct.

Q. That is correct?

A. Yes, sir.

Q. You bought two and a half million, then, from Harry Borak, back in about February, is it, 1955?

A. Well, it was about that time. I was in New York City, and I dealt direct with Mr. Borak and one of his supervisors at the plant. I was there on a convention, and I was negotiating with them, and that date could be easily checked. I can't remember the exact date.

Q. I don't care about the exact date.

A. Yes, but it was about that time.

Q. Sometime before the '55 season?

A. So he—let's see. No, that wouldn't be the '55 season, I believe, in the latter part of January or first of February.

Q. That's when it was?

A. Yes, sir.

Q. All right, and you say you had a very attractive offer from him. What—

The Court:

He said a better offer.

Q. All right.

The Court:
I made a notation of it.

Q. All right. What was the better offer?

A. Well, I think, if I remember, from the nine-fifty—not the nine dollars, but the nine fifty that they wanted then, I believe I bought them for about—let's see, I bought about three sizes, but comparing the same size and weight, I believe I paid him eight thirty five. I can't be sure, but I think that's what I paid him.

Q. And at that time, the big manufacturers were charging $10.00 a thousand for that same bag, weren't they?

A. Well, now, I don't know exactly, you know, what—I will say this, there is two or three people that make plastic bags that always sell a good deal higher than—I will say a good many other of their competitors. I think there is Shalimar and Mill Print—well, those two particularly—at least to my way of thinking, they are always a lot higher than—well, maybe I shouldn't say a lot of others. Quite a bit higher than individual owned plants.

Q. All right. Now, after that first two and a half million you bought, did you place any other orders with Borak's company, make any other big purchases from him?

A. Yes, I believe I did. I just don't have the record, but I think I bought perhaps another two and a half million, or at least a substantial amount.

Q. During the 1955 season?

A. Yes, sir.

Q. All right. Then, in 1956, however, you placed your order with the different company that you mentioned; I didn't get the name.

A. Well, we didn't finish that Cordite company.

Q. Cordite?

A. I entered an order to be shipped last November the 15th for two and a half million bags, with an option if I approved the bag, for another two and a half million to follow.

Q. Uh huh.

A. And they were some 90 days late in delivering and that was why—

Q. Why did you quit Harry Borak?

A. I didn't. I was going to finish the story.

Q. Oh, all right.

A. So I called Harry Borak in New York; he asked if we had secured these other bags, these other brands I was telling you about.

Q. Well, now, wait a minute. Let me stay with this Cordite. Why, since you had bought your 1955 bags from Roto-Lith, did you, before the—in preparation for the '56 season, quit him and go to Cordite?

A. Because I bought them cheaper from Cordite,—

Q. Oh,—

A. I mean from Roto-Lith.

Q. Which was cheaper?

A. Roto-Lith. I mean Cordite.

Q. Cordite?

A. They were cheaper than Roto-Lith.

Q. That is their quotations were, but they didn't deliver them?

A. Yes, they did. They were ninety days late, though.

Q. Oh, all right. Ninety days. So that ran you up into about February and that is when they helped you out by buying a hundred thousand one place and four hundred thousand somewhere else?

A. No, that was—I would say it was over a period of time. You never have let me finish the whole story, see.

Q. Well, all right, sir.

A. So finally I used these bags up, from friendly competitors that Borak called; then I called him, as I remember it, in New York City, and told him that I was desperate for bags and just—it was—I realized it was competitor and I had bought my bags somewhere else, but I asked him if he would help me out. He says, "How many do you have to have, Edd?" I said, "I have got to have at least four hundred thousand now." No, that was in Dallas that I called him. So he said, "Edd, I will cut the plant down in two hours and I will run you four hundred thousand bags tonight, or all I can," something to that effect, which he did, and as I remember,—I could be wrong—then, after about a week or ten days, I called him and asked him to do the same thing over, which he did, and that was the bags I used prior to the shipment I got from Cordite, which I was supposed to have got delivery on those November the 15th and I got it up in about February sometime.

Q. Was that four hundred thousand that you got from Borak, that's all you got from him this season?

A. No, sir, I believe there was—I say I think I ordered again from him a second time.

Q. Well, was it a big order or what?

A. Well, it would have been at least a few hundred thousand. I just can't remember because I didn't know I was going to be asked that question and I can't remember, but I would say it was from two to four hundred thousand.

Q. And what is the present status of the account between you and Borak, or Roto-Lith?

A. You would have to clarify that, I don't know just what—

Q. Well, do you owe him any substantial sum of money or does he owe you any substantial sum of money?

A. No, sir, he don't owe me anything. I owed him —right at this moment, I think I owe him about $1,300.00. A week ago, I owed him about $4,300.00, I believe.

Q. Cut it down about $3,500.00?

A. About $3,000.00 or $3,200.00, something like that.

Q. These bags that you were buying, you say from these shook houses, you say you were having to pay through the nose for those?

A. Yes, sir.

Q. Well, now, the Texas Plastics plant is right up here at Elsa, isn't it?

A. That's right.

Q. And these bags that you were buying from the shook houses were manufactured up there at the Texas Plastics plant, weren't they?

A. I don't know. Dewey Morn is the—Fred would probaby know about that. Dewey Morn, that is the brand I bought. Who made it, I don't know, but I do know I was paying nine dollars and sixty or eighty cents a thousand.

Re-Direct Examination.

By Mr. York:

Q. Mr. Boler, when Meyer told you that Harry Borak was a crook, did that have any effect on you?

A. Yes, it did.

Q. What effect did it have on you?

A. Well, I started counting my bags, for one thing.

Q. You started counting your bags?

A. Yes.

Q. That was a very serious proposition to you, wasn't it?

A. Well, it could break us, actually, over a period of time, if we were short—

Q. It could break you?

A. That's right, over a period of enough time, it could, owing to how much money you got.

Q. After you had counted your bags, and subsequent shipments of bags, you became convinced that he was not a crook, didn't you?

A. That's right.

Q. But if you hadn't made those counts of those bags, you would never have been clarified, would you?

Mr. Wagner:

Well, what is the point in the speculation? I object to speculating about it.

The Court:

I sustain the objection. It is a leading question.

Q. Then at what price did you buy from Cordite?

A. I bought from Cordite for six dollars and a half a thousand.

Q. Going back, when you bought from Roto-Lith, the price that you gave of $8.35, was that on point zero zero one two five mill?

A. Let's see. Well, I believe it was a one and a quarter. I mean that's the way I figure, one and a quarter, and the bag I bought from Roto-Lith at six fifty was also the same weight, but not quite as long a bag.

Q. You mean you bought from Texas Plastics?
A. No, I mean from—
Q. Cordite?
A. Cordite.
Q. Cordite.
A. I did offer this order to Harry Borak. Everything being equal, I—he had favored me, and I would like to say, I just—the principle involved, I did offer him the order, everything equal, and he told me to buy it from Cordite, that he could not or would rather not meet the price.

The Court:
All right, any cross? Further cross? All right. Thank you very much.

The Witness:
Yes, sir.

The Court:
You are excused, sir.

The Witness:
Thank you, sir.

Mr. Abbott:
Your Honor, did you wish to go forward? I don't know that I have my evidence prepared at this point.

The Court:
Well, we are going to have to, if we get through here. I am willing to take a short recess. Can you go forward with any other witnesses this afternoon?

Mr. Abbott:
If the Court please, may co-counsel and I have just a few minutes to discuss our strategic position?

The Court:
Well, I—

Mr. Abbott:
We have no more witnesses.

The Court:
I am going to excuse the jury 'til in the morning at 9:00 o'clock and I want to see counsel in chambers.

Mr. Abbott:
Yes, sir.

The Court:
Now, ladies and gentlemen of the jury, do not discuss the case, don't permit anybody to discuss it in your presence, and don't talk to anybody about vegetables and how they wrap them and where they get their bags or anything of that kind. I will recess you 'til in the morning at 9:00 o'clock. Court is still in session until the jury has retired and I will see counsel in chambers.

Mr. Abbott:
Your Honor, about the witnesses, now Mr. Boler is excused, as I understand it?

The Court:
All of them are excused, as far as I am concerned. You gentlemen ought to let them know. I think you had just as well let the witnesses go, that you have

used, except you might want to use one for rebuttal, you said.

Mr. Abbott:
Yes, sir.

The Court:
All right.

(Whereupon, at 4:55 p.m., May 22, 1956, Court was recessed until 9:00 a.m., of the following day.)

Morning Session, May 23, 1956.

Mr. Abbott:
Would you please mark those the next numbers? Mr. Borak, would you please take the stand?

(Whereupon Plaintiff's Exhibits Numbers 4 and 5 were marked for identification.)

HARRY BORAK, a witness who had heretofore testified herein, being recalled, testified as follows:

Direct Examination.

By Mr. Abbott:
Q. Mr. Borak, directing your testimony again to the conversations that you had with Mr. Petchesky, have you had any conversations with any officer of Vahlsing regarding the matter that was discussed?
A. Mr. Vahlsing Senior.
Q. What was the substance, or rather, I would like for you to detail the conversation.—

A. I called—

Q. —and when it happened, please.

A. The day after Mr. Petchesky told me that nothing could be done, I called Mr. Vahlsing Senior in Corpus Christi, at a hotel. I told Mr. Vahlsing that I had just come up from the Valley and I had heard the stories, I had dinner with Mr. Fred Meyer, that he had admitted it to me and apologized.

Q. What were these—what was your exact conversation to Mr. Vahlsing? What did you tell him?

A. That I had confronted Mr. Meyer with him telling Mr. Lutz, Mr. Boler and Mr. Benson that I had been fined by the Bureau of Weights and Measures, "that you had to sue me to get a refund of money; that I was a crook, and if they did business with me, I would cheat them."

Q. And what did he say to you?

A. He said, "Well, I don't know." I then told him that Mr. Lutz had given me an order for three million bags and I wanted to cancel them because Mr. Meyer had gone back to Mr. Lutz and again repeated these crooks and cheats and "we had to fine him and I will prove it to you."

Q. When did Mr. Meyer go back to Mr. Lutz? Was this a subsequent conversation?

A. After I had left the Valley, and had Mr. Meyer's promise that he wouldn't repeat it.

Q. You told Mr. Vahlsing about this?

A. I told Mr. Vahlsing about it, and that Mr. Lutz was waiting for him to call him, that he wanted to cancel the order, and would he please do so, and now that it has gone further, that the whole story is throughout the whole Valley, and I would like him to print a retraction in the newspaper, that he never had to sue me, that I never cheated him, and he refused to do it.

Q. And did he state why?

A. He said something—he said to me, when I told him about printing a retraction, because I was being hurt so badly, the reason of why, he said, "I don't retract anything. The Vahlsing—" no, "The Vahlsing group doesn't retract anything."

Q. Was that the end of that conversation?

A. That was the end of that conversation that day, he refused to retract, he refused to call, he refused to print anything, they don't do that.

Q. Did you—he did not state to you whether he had called Mr. Meyer regarding this matter at that time?

A. Not on that conversation.

Q. All right. Then did you have a subsequent conversation with Mr. Vahlsing or any other officer of that corporation?

A. Mr. Vahlsing next called me—

Q. I would like to go back to the date preceding that conversation with Mr. Vahlsing Senior, did you have a conversation with any other officer prior to that time?

A. With Mr. Vahlsing Junior.

Q. And what was that conversation?

A. I had called Vahlsing Junior, I told him that I had been trying to get Mr. Senior, his dad; I told Mr. Vahlsing Junior that I had just come up from the Valley, that Mr. Meyer, when confronting him with the stories of this slander, that he had gone about, apologized to me, and I took an order from Mr. Lutz and Mr. Lutz is now phoning me that Mr. Meyer has been back and told him even more stories about the fining and cheating and "You had to sue me," and I want to get Dad to call up and retract it, and Junior said, "We don't retract anything."

Q. All right. Now, then, the following day, as you detailed, you talked to Mr. Vahlsing Senior?

A. In Corpus Christi.

Q. Did you have any subsequent conversations with anyone connected with the corporation, and, if so, state to whom?

A. With Mr. Vahlsing Senior. About the middle of March, Mr. Vahlsing Senior called me. That was a day or two days after Mr. Meyer, or Texas Plastics, had been served with papers in this slander suit.

Q. Yes.

A. Mr. Vahlsing Senior called me, said, "Hello, Borak." I said, "Yes?" "You better withdraw this suit or I will break you and your company."

Q. Then what happened?

A. I told Mr. Vahlsing Senior that if that's the way he is going to talk to me, I am going to hang up.

Q. All right.

A. I told Mr. Vahlsing Senior that these stories now had gotten out of the Valley, that I had just heard it from Miami, I had just heard it from the coast, a story just came in from Boston about it, it is widespread, that I had been terribly hurt about it, and I was sick.

Q. And what did he say to you further?

A. Mr. Vahlsing Senior said, "I am telling you again, you haven't go a chance in Texas; your lawyers are my lawyers; they represent me too; what chance do you think you have, coming in from New York?" And I hung up on him.

Q. And that was the termination of that conversation?

A. Then I called Mr. Abbott,—right after that call, I called Mr. Abbott,—

Q. Well, no need to go into that conversation with me. Did you have any further conversations with any other officers or with Mr. Vahlsing, subsequent to that one?

A. Mr. Vahlsing Senior, four months ago, on my last trip to the Valley, I was at the Casa de Palmas, waiting in the lounge, and I felt a man's arm on my shoulder; I turned around, it was Mr. Vahlsing Senior; he invited me to come in and have dinner with him; I was reluctant to do it, I had not spoken to him since he said he wanted to talk to me; we had dinner; then invited me to go down to his new vacuum cooling shed, he wanted to show me what this new shed looked like; how many trucks it could take in through this vacuum cooling plant at one time; I went along with him; we spent a couple of hours there; we drove back to the hotel and Mr. Vahlsing Senior, just before he left me, said to me,—

Q. Just a moment.

Mr. Wagner:

Now, just a moment. I believe, Your Honor, that this conversation—I am not sure—has to do with possible—

The Court:

Yes.

Mr. Wagner:

—settlement, or compromise discussion, which is improper, of course.

Mr. Abbott:

Your Honor,—

Mr. Wagner:
I am not sure. I haven't talked to the witness.

Mr. Abbott:
I don't wish to go into that phase of it. There is another portion of the conversation that I think would be admissible.

Mr. Wagner:
Well, I rely on counsel. He understands.

The Court:
All right.

Mr. Abbott:
I trust my witness does too.

The Court:
All right. Now, you just answer the question, and pay close attention, don't volunteer a thing. You may not understand the rule I am talking about, but direct his attention to specific—

Q. Specifically, did he tell you—

The Court:
—anything about—

Q. —anything about a conversation with Fred Meyer and what he had found?

A. He had found now that these stories were true and he wanted to now print a retraction.

Q. Now, wait a minute. He found what stories were true?

A. The story about the crook and thief and cheat and suit and all of the things I had told him.

Q. And he wanted to print a retraction?

A. H. offered to print a retraction in all the newspapers that I wished.

Q. All right, let's leave that conversation at that point. Now, have you had a subsequent conversation with any officer of that corporation, prior to this trial?

A. Monday morning,—today is—today is Thursday?

Q. Yes, sir.

Mr. Wagner:
Today is Wednesday.

Q. Wednesday.

A. Wednesday. A week ago Monday morning, Mr. Vahlsing Senior called me at my office, from Corpus Christi.

Q. Did he discuss this suit?

A. He did, sir.

Q. Was the conversation limited to much the same thing about retraction?

A. He offered—he offered—

The Court:
No, no, he didn't ask you that.

A. It was limited to which, sir?

Q. To—the conversation—if there was anything mentioned with regards to a retraction, that's what I want to limit it to.

A. He offered to print a retraction in any newspaper. He again made me the same offer. I told Mr. Vahlsing that this is the only--the only thing I ever wanted, a year and a half ago.

The Court:

All right. Now, he didn't ask you that, he just asked you what Mr. Vahlsing said to you.

Q. All right. Now, you have stated that you informed Mr. Vahlsing heretofore that you had received stories from throughout the country relating to the stories that originated here. Would you go into some detail on that?

A. Well, I had gone to California,—we do business in Salinas, amongst the shippers in California. People that had been friendly to me and had promised business to me, right after these stories broke, and upon my visit to them, instead of being cordial, were very distant to me. As a salesman, I had the sense of feeling that they didn't want to talk to me, and I wasn't able to bring myself to a point and ask them if it was because of these stories that they had heard. I felt as though if I did and if I was on the wrong track they may say, "What story?" And I felt everything just tumbling down and crashing in and there was nothing I could do about it, and this happened in California, where today we have very little business there to speak of. Here four months ago, I got a call from a Mr. Chandler, in Waco, Texas, whom we have sold millions of bags to, calling me up and telling me, "Harry, I have just had a call from a salesman of the Texas Plastics Company and this man sure does hate you." I asked him what he meant and he said, "This man came in and said, 'You are

buying from Roto-Lith; they are not a good company to buy from; they don't print well, they don't make a good bag'." I heard this story from Dallas, from a Mr. Hank Forshmith, not the story itself, I will take that back,—

The Reporter:
Mr. who?

A. Mr. Hank Forshmith, of the Forshmith Produce Company, whom I had been doing business with for seven or eight years, and he told me—our relationships had been happy. I don't know whether it is because of price or what, but I can't say anything, but I feel it all around me, that he heard something, and this thing has been going on that way for this whole past year and a half.

Q. All right, sir. Now, some reference was made yesterday, Mr. Borak, to the price that you quoted to Mr. Boler, as I understand it; would you tell us about that, on bags?

A. When I sold Mr. Boler his bags, my price was $9.50 per thousand. He then told me that he had bought from Texas Plastics for $9.00 per thousand. My price had been and was higher than Texas Plastics.

Q. Now, on what type or what weight bag was that?

A. On oh oh one five.

Q. Oh oh one five. Is that referred to as one and a half mill?

A. One and a half mill thickness. He asked me if I would meet the price of $9.00 and I told him that I would. I, however, suggested to Mr. Boler that with polyethylene—the knowledge of polyethylene, the

structure and the strength that polyethylene has now got, that one and a quarter mill should be satisfactory for one pound carrot bags, and the price would be eight thirty five per ton. He enjoyed that and liked it; however, when he pressed me for a delivery of two million bags, and getting back to the plant, I had not any one and a quarter mill in stock, and I believe that I started to deliver him on one and a half mill at eight thirty five, and then completed and finished with one and a quarter, but Mr. Boler showed me invoices from Texas Plastics for $9.00 a thousand, when I wanted nine fifty.

Q. Now, in that connection, sir, did you give a special price to Mr. Boler?

A. That was our—the price of eight thirty five.

Q. Yes, sir.

A. I gave him a special price, under our price list, and when I arrived back at the office, we made up new price lists, because I didn't want to sell here for eight thirty five and sell the next man for nine dollars. I found that the only way, now, that I could even be entertained and thought of to be given business was by being cheaper than the next fellow.

Q. Now, what was the reason for this being entertained and heard to present your sales efforts?

A. Because in the Valley, with these stories around, at the same price, I didn't have a chance of selling any more. Maybe with a cheaper price, they would give me a chance to show them that I was an honest dealer, and I therefore changed my whole price list and whole ~~price~~ structure throughout all of our customers. I never believed in having a price list of so much here and so much there. There may have been variances to the quantities ordered. In other words, if a man ordered five million bags, he

was entitled to a cheaper price than a man that ordered three million bags.

Q. Did this adjustment in price that was necessitated—did this situation extend throughout the United States?

A. Wherever we had a customer, I got a volunteer cut.

Q. What percentage of your profit did that—how did that affect the percentage of your profit?

A. Oh, it ate right into it, because—well, in the Boler case, the price was nine fifty, which would have made it approximately eighty ninety on one and a quarter mill, and I gave it to him for eight thirty five, which is sixty cents, two and a half million bags, was $1500.00, on just one order.

Q. Yes, sir. Now, Mr. Borak, there was Mr. Lutz on the stand yesterday and counsel for the defendant, Fred Meyer, and Texas Plastics, interrogated him regarding some alleged shortages that are claimed in a cross action. You had originally filed a suit, as I understood, against Mr. Lutz. Would you go into that, please? Tell us what happened.

A. As to the suit?

Q. Yes, sir.

A. Mr. Lutz owed me—

Mr. Wagner:

Well, now, just a moment. I am going to object to conversations that is hearsay, and conversations had out of the presence of the defendant. I don't know what they talked about.

The Court:

Well,—

Mr. Wagner:
He can't just turn him loose here. I will object to the question in that it is calling for narrative statement instead of proceeding in proper question and answer form so I may lodge my objection. I have no idea what the man is going to say, where he just says, "Tell us what happened."

The Court:
All right, counsel.

Mr. Abbott:
I will be glad to confine it.
Q. Did you sell Max Lutz bags, at one time?
A. I did, sir.
Q. And when was that?
A. February—I started to sell Max Lutz bags in February of 1954.
Q. Now, that was the sale that brought up this whole crisis, is that correct?
A. The three million sale, that is correct.
Q. All right. Then, after that, did you continue to sell him?
A. I did, sir.
Q. Now, in stating about this sale, this was February of 1955, as I understand it, that you were selling Mr. Lutz?
A. February of 1955 is right.
Q. All right, sir. Now, after that, did you sell Mr. Lutz additional bags?
A. I did, sir.
Q. And what quantity, what business did you do with him, if you know?
A. I would say about $50,000.00, maybe sixty.

Q. All right, sir. Now, over what period of time did you deliver these bags?

A. Three months.

Q. Three months?

A. Three months.

Q. All right, sir.

A. February, March, April.

Q. All right, sir. Now, was Mr. Lutz keeping his account with you current?

A. No, sir.

Q. What was the status of it in April or May?

A. Mr. Lutz owed us—in April or May?

Q. Of 1955.

A. Well, he owed us, then, maybe twenty five, thirty thousand dollars.

Q. All right, sir. Now, directing your attention to on or about May the 20th, 1955, state what happened.

A. Around May twenty—the end of May, Mr. Lutz owed me fifteen thousand and some odd dollars, for which I wanted payment; he was not able to pay me, and I told Mr. Lutz that if he needed—

Q. Now, particularly with reference to a trip that you made down here.

A. I received a call from Mr. Abbott that Mr. Lutz had brought two cartons of bags over to his office.

Mr. Wagner:

Now, just a moment. I am going to object to any transactions that went on—what Mr. Abbott told him Mr. Lutz had done.

The Court:

Yes, I sustain the objection.

Q. Did you make a visit down here and contact Mr. Lutz?

A. I flew down, at the end—the latter part of May, to go to Mr. Lutz.

Mr. Abbott:

Your Honor, is it my understanding of the ruling of the Court that he cannot go into transactions at that time with Mr. Lutz, which were the subject mater of cross examination of Mr. Lutz yesterday, regarding a shortage? Mr. Wagner went in, with Mr. Lutz,—

The Court:

Well, I haven't got anything to rule on yet about that.

Mr. Abbott:

All right, sir.

The Court:

I don't know what you are talking about.

Q. You contacted Mr. Lutz when you arrived here in May?

A. I did, sir.

Q. And what took place at that time?

A. I visited with Mr. Lutz at his shed. I told Mr. Lutz—

Mr. Wagner:

Now, wait just a minute. I am going to object to any conversations between this witness and Mr. Lutz, on the grounds that it is hearsay as to me, I don't know what counsel's objective is, if he is striving to

impeach Mr. Lutz on something said on that occasion, he hasn't laid the proper predicate for impeachment; furthermore, Mr. Lutz was his own witness, put on the stand by him, and if he is seeking to impeach him, he should have laid a predicate for it. I don't think he can impeach his own witness, but even if he could, he hasn't laid a predicate for it.

Mr. York:

Well, Your Honor, as far as our witness is concerned—and I made the objection yesterday that it had not been gone into on direct, and the Court said that it would be all right for him to go ahead and cross examine him at that time, but that, of course, doesn't detract from the fact that he is his witness on those points.

The Court:

But still he was your witness. I have uniformly held that counsel may cross examine about anything. Of course counsel for the other side may go into it on redirect of the witness and lay a predicate for impeachment, if a witness is unfriendly and counsel states that he is surprised, I can permit impeachment, not as a matter of original testimony, but simply in order that counsel who put him on, if he did, in good faith, would not be bound by him. I don't know what you are trying to prove.

Mr. Abbott:

Your Honor please, it is our position that the defendant was attempting to show truth of these shortages and so on by the testimony of Mr. Lutz, which they elicited by their questions yesterday. I think that I have the right to combat that testimony with an-

other person who was present. They utilized his information to get in a defense of truth.

Mr. Wagner:

I will agree, Your Honor, that this witness' testimony is that he and Mr. Lutz counted some boxes and the boxes that Mr. Lutz has testified were short, that they found that they weren't short, that would be proper impeachment, but it is not proper—I mean if it be original evidence, not impeachment.

The Court:

Yes, sir.

Mr. Wagner:

But if it is offered here for the purpose of impeaching Mr. Lutz because of something Mr. Lutz said to this man, it is not proper.

The Court:

I think they are right about that, counsel. I think the defense is right about that.

Mr. York:

We are offering these conversations only for impeachment of Mr. Lutz, not as original evidence, as Mr. Wagner stated, but for prior inconsistent statements by Mr. Lutz himself, and as to what occurred, I mean just as to the conversation.

The Court:

I will let you show anything that occurred, but I don't believe I can permit testimony as to conversations with him.

Mr. York:
Prior inconsistent statements of Mr. Lutz,—

The Court:
I sustain the objection.

(Whereupon the following proceedings were had at the Court's bench, out of hearing of the jury.)

The Court:
What do you want to prove by this witness, now?

Mr. Abbott:
Your Honor please, I would like to make a record of the testimony now or at a recess or at the Court's convenience, to show that this witness came—that Mr. Borak came from New York upon a rumor that Max Lutz had a shortage and that he conferred with Max Lutz in his shed and Mr. Lutz stated that he did not have a shortage, that he believed and knew that he had a good delivery, that, in truth and in fact, he had a number of boxes, as many as twenty three to forty, up in a special room in his upstairs of his shed, and that those boxes had been selected out of the over-all shipments, by Mr. Fred Meyer, an employee of Texas Plastics, and one John Snider, an employee of the Max Lutz shed; that they had been weighed and put specially aside; that further, the bags which were stored in their regular storeroom had apparently been by-passed by these two gentlemen. Mr. Borak then said that he would like to count, and he had employed, already, ten boys, to count the bags, and if there was any shortage whatsoever, he wanted to know about it, first, to protect his own company, he wanted to fire the em-

ployee that had done it, and second, he certainly wanted Mr. Lutz to have a good delivery. Mr. Lutz said, "I have had girls counting these bags down at the warehouse, where Mr. Snider and Mr. Meyer had no connection with them, and they are good delivery and I accept it as a good delivery. I make no complaint." I would further like to make a record that Mr. Lutz selected two boxes out of the upstairs room, which even he admits he had no contact with, they were brought up there especially, and he handed them to me and I counted them and they were short, but Mr. Lutz stated that they were out of his—did not have control of them and he could not assure us that they had not been tampered with by Mr. Meyer and Mr. Snider.

Mr. Wagner:
Jim, if you had laid a proper predicate—you should have asked Lutz, when you had him on the stand, to lay a predicate for all this.

The Court:
Yes, I will have to sustain the objection at this time, in the absence of a predicate for it, anyway, I will have to sustain it. Now, this shows what you would prove by this witness.

Mr. Abbott:
That's right.

The Court:
So it won't be necessary to question him about it at this time.

Mr. Wagner:

Jim, you are not hurt by that, because Meyer is going to have to take the stand. You can lay your predicate then, if you just want to get it in, but now, you haven't got a predicate for that.

Mr. Abbott:

Well, I didn't remember, Fred, if you had gone far enough into it yesterday or not.

The Court:

No, you didn't ask Lutz about that.

Mr. Abbott:

Well, I got kind of worn out on that.

The Court:

Well, you have got your bill and if you want to put it in later, I will permit you to do so.

Mr. York:

We did lay a predicate on the stories that Fred Meyer told him yesterday and we have authorities for the proposition that when we are surprised we can impeach him by prior inconsistent statements.

The Court:

It would simply justify putting him on the stand.

Mr. York:

Well, we would like to exonerate the thing and show that he has changed his story and—

Mr. Abbott:

Your Honor, it is not offered to prove the truth—

Mr. York:
Just to clear up our position.

The Court:
I understand, as far as any libelous statement made to Lutz is concerned, that is out of the case, because your proof has fallen down on it.

Mr. Abbott:
Yes, we don't offer to prove they were made to Lutz, but merely that Lutz made them; not that Meyer made them, but that Lutz made the statements that are now inconsistent.

The Court:
As showing good faith.

Mr. Abbott:
Yes, sir. I have an authority, if the Court would like to see it.

The Court:
Oh, I am familiar with the authorities. I believe you asked him if he had ever told anybody, in substance.

Mr. Abbott:
Yes, sir.

The Court:
I will have to limit it and instruct the jury that that count is out, as far as any libelous statements made to Lutz is concerned, is out of the lawsuit.

Mr. Abbott:

Except, Your Honor, we have shown Mr. Borak informed Mr. Vahlsing and Mr. Vahlsing Junior of these statements by Lutz.

The Court:

Well, that doesn't supply the proof that Meyer made them. You can't stand on any libel to Lutz, slander to Lutz, rather. Well, I will permit you to do that and give a proper instruction on it, but this other, you have got your record complete.

Mr. Abbott:

Thank you, sir. Now, in that connection, Your Honor, I had anticipated a quite lengthy examination of this witness on the Lutz incident. May I check and see if my other witness is out in the hall?

The Court:

Well, let's get through with him first. I will give you time.

Mr. York:

If we may be sure that we are clear, the Court is ruling that we can't introduce prior inconsistent statements of Max Lutz to show that he was not actually inconsistent with his statements that he was shorted?

The Court:

Not unless you lay the predicate with him.

Mr. York:

All right, sir.

(Whereupon the following proceedings were had in open Court.)

Q. All right, now, Mr. Borak, I would like to direct your attention to your trip down here to the Valley in or around February 12, 1955, in response to the telephone call from Fred Stone that you have previously related, and with particular reference to your conversations at that time with Max Lutz, will you please tell the Court and the jury what transpired on that occasion?

A. The first time I saw Mr. Lutz?

Q. Yes, sir.

Mr. Wagner:

This is February, now?

Mr. Abbott:

Of 1955.

A. Mr. Fred Stone brought me to Mr. Lutz' shed and introduced me to Mr. Lutz. I told Mr. Lutz the purpose of my visit there was to sell him bags. I showed him what I had to offer, the price; he told me he didn't know, he had heard some bad things about me, and he didn't know whether he would want to do business with me.

Q. Did he tell you what he had heard?

A. I pressed him as to the bad things he had heard. He told me that Mr. Fred Meyer had—

Mr. Wagner:

Now, just a moment, Your Honor. This is getting evidence in by hearsay to what Lutz said Meyer said and it is pure hearsay on the question of whether Meyer said it or not and it is not admissible.

The Court:

In view of the conference at the bench, I will state that the Court has ruled this, that in view of the testimony of Plaintiff's witness Lutz, the alleged slander uttered to Lutz is—there can be no recovery upon it for the reason that Plaintiff's proof has fallen down, Lutz has testified that he didn't—that Meyer didn't tell him the things about this company and about Mr. Borak that they say he did, so there couldn't be any recovery based on an alleged slander uttered to Lutz. I will, however, in view of the fact that counsel for the plaintiff placed him on the stand, and have made these allegations, permit him to show, as he led the—he asked Mr. Lutz the question, "Have you ever told anybody this?" and Mr. Lutz denied that, so I am going to permit the plaintiff to establish, if he can, that Lutz did make statements similar to what is in the complaint—alleged to have been made by Lutz, for the purpose of showing the good faith of the plaintiff—Plaintiff's attorneys, in making the allegation and—that they were surprised at his testimony, and for the further purpose that plaintiffs may not be bound by the testimony of Lutz, having placed him on the stand. Ordinarily, lady and gentlemen of the jury, a person is bound by the testimony of a witness that he places on the stand and vouches for, but if he is surprised and can show that by testimony that he is surprised, then he is permitted to impeach the witness, so he will not be bound by it. Now, if this witness testifies that Lutz told him the thing—in substance, what plaintiff says Meyer had told Lutz, it is not evidence that Meyer had told Lutz that, and I instruct you not to consider anything this witness may say about what Lutz told him as any evidence that Meyer actually told Lutz that, I am simply limit-

ing it to the question of good faith of the attorneys for the plaintiff in making the allegation in the complaint, and in order, too, that they may not be bound by Lutz' testimony. You may have your exception, counsel.

Mr. Wagner:
I don't have to state any more than that?

The Court:
Sir?

Mr. Wagner:
The Court doesn't want me to state the grounds of my objection?

The Court:
Yes, you may state them.

Mr. Wagner:
Well, Your Honor, I would agree with Your Honor in a case where there is a conflict of testimony, for example if some other witness had testified that these statements were made to Lutz and Mr. Lutz came in and denied them, then I say this character of thing—this rule would apply, that plaintiff is still seeking to prove on the charged statements made to Lutz, but this record is totally devoid of any evidence to substantiate the Lutz charges, and—

The Court:
I am not going to let the jury give him anything on anything they claim he said—Meyer said to Lutz. I am going to tell the jury—I am going to tell them now and I am going to tell them later, that the portion

of the complaint seeking to recover damages for anything said to Lutz is out, because Lutz failed, he didn't substantiate what they said Meyer told Lutz, that is out, and the only reason that I am permitting this testimony as to what this man says Lutz told him is for the purpose of showing why the attorneys put it in the complaint and in order that they may not be bound by him as their witness, which ordinarily they would be.

Mr. Wagner:
Well, I still think it is improper, Your Honor.

The Court:
You have your exception.

Mr. Wagner:
Fine.

The Court:
That it is hearsay and not proper—they have no right to impeach their own witness.

Mr. Wagner:
That's right.

The Court:
And any other ground that you may desire to urge—

Mr. Wagner:
Fine.

The Court:
—without stating it in full.

Mr. Wagner:
Thank you, Your Honor.

Q. Now Mr. Borak, did you detail—

The Court:
Now, counsel, I don't suppose you would have any objection to him asking a leading question,—

Mr. Wagner:
No.

The Court:
—"Did he tell you, in substance, this," in order to let this witness answer "Yes" or "No"; in other words, the form of the question.

Mr. Wagner:
The form of the question, I make no objection to.

The Court:
He doesn't understand, maybe, and he might add things to it that would be improper.

Mr. Abbott:
I see. All right, sir.

Q. Mr. Borak, returning now to this conversation on or about February 12th or 13th or 14th of 1955, you have stated that you had a conversation with Mr. Lutz, is that correct?

A. That is right, sir.

Q. Did Mr. Lutz, after the preliminary negotiations regarding the selling of the bags and his evidence of being a little bit reluctant to go through with it, state to you—

The Court:
In substance.

Q. —in substance, that Fred Meyer had said that you and your company, Roto-Lith, were crooks or cheats or cheap chiselers, that they would short count you and that "you would wind up in the end paying more to them for bags than you will from us," speaking of Texas Plastics, because of the short count, and they do it through means of giving short weight of polyethylene, or bidding on the outside instead of inside dimensions, and with reference to the Bureau of Weights and Measures, that they had filed a complaint and Roto-Lith had been fined? Did he state that to you, in substance?
A. He did, sir.

The Court:
That's it, now.

Mr. Abbott:
All right.

The Court:
That ends it. Now, again, I instruct you, ladies and gentlemen,—or lady and gentlemen, first, any claim in this case by the plaintiff that Mr. Meyer libeled or slandered them by any statement he made to Lutz is out of the case and there can be no award of damages whatever for the reason that Mr. Lutz, the witness upon whom plaintiff relied, testified that no such statement was made to him, and the testimony of this witness that Lutz told him that Meyer had said that cannot supply that missing link, that is hearsay as to the defendant Meyer and Texas Plastics,

and the only reason I have let it in, as I stated a moment ago, is simply on the question of the good faith of the attorney in placing the allegation in the complaint and in order that they will not be bound by Mr. Lutz' testimony as their witness. He was manifestly an unfriendly witness. All right.

Mr. Wagner:
Are you through, Mr. Abbott?

Mr. Abbott:
Just a moment, sir. All right.

The Court:
Now, that is as far as I am going to let you go on this, counsel.

Mr. Abbott:
All right, sir. On that, I am through, Your Honor.

The Court:
All right.

Q. Now, let me ask you a question, sir. Were you ever fined by the Bureau of Weights and Measures of New York?
A. Never.

The Court:
Was your company?
A. Never.
Q. Did you ever violate the rules and regulations of the Bureau of Weights and Measures?
A. In the eighteen years I have been in business,—

The Court:
Now, just answer it "Yes" or "No."
A. No, sir.

The Court:
All right.

Q. State, if you know, what was the disposition of the charges filed by Vahlsing, Incorporated, against Roto-Lith, in the Bureau of Weights and Measures?

Mr. Wagner:
Now, just a moment,—

A. I was dismissed—

Mr. Wagner:
Just a moment, please, sir. As to that, Your Honor, it seems to me that he is testifying as to the contents of the records of the Bureau—

The Court:
I sustain the objection.

Mr. Wagner:
—of Weights and Measures, and if they weren't here, I would make no objection but they are here and—

The Court:
I sustain the objection.

Q. Now, has Vahlsing or any of the Vahlsing Companies ever had to file a lawsuit against you or Roto-Lith Company?
A. No, sir.

Q. They have not done so?
A. No, sir.

Mr. Abbott:
We have no further questions.

Mr. Wagner:
Will you mark this, please?

(Whereupon Defendant's Exhibit No. 6 was marked for identification.)

Cross Examination.

By Mr. Wagner:
Q. Mr. Borak, I will hand you a document that has been marked D-6, by the Clerk. I neglected to ask you about that invoice yesterday. That is another one of your invoices, is it not?
A. Yes, sir.

Mr. Abbott:
Now, Your Honor, we object to it until the materiality of it is shown.

Mr. Wagner:
Your Honor, I agree that it appears immaterial at this time.

The Court:
All right.

Mr. Wagner:
It is an invoice and it is a basis for other testimony.

The Court:
All right.

Mr. Wagner:
I won't bother the jury with reading it. It is fourteen thousand bags in film form. That is not made up.

Q. You mentioned a total dollar figure, in your dealings with Mr. Lutz, of fifty thousand or sixty thousand; I think he mentioned a total bag figure of about five and a half million; does your recollection accord with his as to the bag figure?
A. Well, five and a half million would be about forty four thousand, forty five thousand. It may be correct, sir.

Mr. Wagner:
That's all, Your Honor. Thank you.

The Court:
All right.

Mr. Abbott:
You are excused. Your Honor, may I see if my next witness is present?

The Court:
Yes, sir.

Mr. Abbott:
Your Honor, I would like to call Mr. Borak back for one or two more questions.

The Court:
All right.

Mr. York:
May we approach the bench, Your Honor?

The Court:
All right.

(Conference between the Court and counsel, at the Court's bench, out of hearing of the reporter and jury.)

Re-Direct Examination.

By Mr. York:
Q. Now, Mr. Borak, without mentioning any statements or conversations, what was generally the basis of your suit against Max Lutz?
A. Max Lutz gave me a $1,500.00 check dated for December 10th—pre-dated, a $2,500.00 note, about four weeks later, a $5,000.00 note, dated another four weeks, and another $5,000.00 note to clean up his account.
Q. Yes, sir.
A. The December 10th check, we were asked to hold for two weeks, as he didn't have the money, and we did, and we deposited it and it was paid; the $2,500.00 note, upon its due date, was paid; the $5,000.00 note came due January 1st; it was protested; there was no money in the bank for it. I was told that—

Mr. Wagner:
Now, just a moment, Mr. Borak. Don't tell what you were told, and anyway, I think this is all objectionable, but if it is going to be short,—

Mr. York:

Well, we want to prove up the whole suit. They have brought in here, showed Mr. Lutz was short, and we want to prove there was no shortage.

The Court:

All right, go ahead.

A. The second note wasn't paid, there was no money for it; when the last note was due, he paid the one he had not paid prior, and the last note, he did not have the money, for which was $5,000.00, and that is the note which I sued for. The last $5,000.00 was not paid.

Q. Now, how much, in all, did he pay, out of that, how much of those notes and checks and so forth did he actually pay?

A. Of the grouping of fifteen thousand and some odd dollars, he paid everything but five thousand. He paid ten thousand and some odd dollars.

Q. And then you say you brought suit against him on that note?

A. On that one note.

Q. On the $5,000.00. That was for the balance on the bags that you had sold and delivered to him?

A. That was on the balance of the forty five or fifty thousand dollars worth of goods I had sold to him.

Q. When was payment due of that note, approximately?

A. January, maybe 15th—January 15th or February 1st.

Q. Of this year, 1956?

A. That is right, sir.

Q. When had the account been due for which he gave you that note for an extension of time?

A. The account was due one year, nine months to a year.

The Court:
Was this note given after the count of the bags in Lutz' shed?
A. Yes.

The Court:
All right.

Mr. York:
That's all.

Re-Cross Examination.

By Mr. Wagner:
Q. Jim Abbott got those notes for you, didn't he?
A. Jum Abbott forwarded the notes to New York, yes, sir.
Q. Well, you had arranged with him to get them, hadn't you?
A. I arranged with Mr. Lutz to give Mr. Abbott the notes.
Q. Mr. Abbott was your attorney?
A. That is right, sir.
Q. And Mr. Abbott was also Mr. Lutz' attorney?
A. I do not know.
Q. In order to get Lutz to give you those notes, didn't you agree with him that you would adjust the shortage that he was claiming?
A. That is not true, sir. I was never told anything about a shortage. No one ever made a claim to me until three weeks ago.

Mr. Wagner:
That's all.

Mr. York:
That's all.

The Court:
All right.

Mr. Abbott:
Your Honor, that really should be clarified.

The Court:
All right.

Re-Direct Examination.

By Mr. Abbott:

Q. You state no one made a claim for a shortage until three weeks ago. What do you mean?

A. Well, three weeks ago, Max Lutz said that I owed him money for a shortage.

Q. On what?

A. On the bags that I sold him last year.

Q. And how did you find that out?

A. I cited him and started a suit and he entered a counter-suit.

Q. And that is the—

A. That is the first time I ever heard of it.

Q. Other than the incident that arose in May?

A. That's right.

Mr. Wagner:
Your Honor,—

The Court:
Yes, sir.

Mr. Wagner:
—what incident that arose in May? The bags that—

(Counsel conferring, out of hearing of the reporter.)

Mr. Wagner:
Well, now, I don't understand that about—

(Counsel conferring, out of hearing of the reporter.)

Q. When you came down here in May, as counsel has stated, I had counted two boxes of bags?
A. Yes, sir.
Q. And that was in the nature of a complaint—

Mr. Wagner:
Now, just a minute, Your Honor, he is trying to straighten his witness out and I object to him leading him on it.

Mr. Abbott:
All right.

The Court:
All right.

Mr. Wagner:
Are you through?

Q. Subsequent to the May incident, did Mr. Lutz give you the notes?

A. Mr. Lutz gave me the notes the following November, to clean up his whole account, in full.

Q. Now, was there some talk of an adjustment of any kind at the time he gave the notes in October or November?

A. There was talk of $517.00. Three million bags were sold to Mr.—

Mr. Wagner:

Now, just a moment, I object to "talk" and going into the details of the conversation.

Mr. Abbott:

All right.

Mr. Wagner:

The general—

Mr. Abbott:

I have no further questions, Your Honor.

Re-Cross Examination.

By Mr. Wagner:

Q. So when you just flatly said a while ago that there wasn't any claim by Lutz of a shortage until three weeks ago, you weren't correct, were you?

A. I was very correct.

Q. Didn't you—just now, he got you to say that he counted Lutz' back in May of '55 and he phoned you and as a result of that, you came down here.

A. That is right, sir.

Q. Because he told you the boxes he had counted were short?

A. That is right, sir.

Mr. Wagner:
All right, sir. That's all.

A. In November he gave me my money,—

Mr. Wagner:
No, no, that's all.

Mr. Abbott:
That's all. Your Honor, subject to the right to call Mr. Lutz and Mr. Blackwell, for impeachment purposes, plaintiff will rest.

The Court:
Plaintiffs rest. All right.

Mr. Wagner:
I don't understand the statement of counsel here, subject to—

The Court:
I had told him when you were up here at the bench, you remember, that since he had not laid the predicate with Mr. Lutz, I would not permit any—

Mr. Wagner:
Impeachment.

The Court:
—impeachment, and I told him I would permit him to recall him for that purpose, if he desired to do so.

Mr. Wagner:
Yes, but I didn't understand any conversation about recalling Blackwell, Bob Blackwell.

Mr. Abbott:

That is consistent with our conversation at the bench originally, the predicate was laid as to whether he made statements to anybody. I asked the question, "Did you make any statements to anybody?"

The Court:

Yes, I recall that question.

Mr. Wagner:

Well, are you resting, then, subject to the matter of—Blackwell, as I understand your reservation, in the record,—

The Court:

It would simply be corroborative on the same question that I permitted Mr. Borak to testify a while ago and would not be proof that Meyer had said that, but simply Lutz—I mean on the question of the good faith of the attorneys and surprise and so forth. It is not—the Lutz statement is out, as far as any recovery is concerned, they can't get a penny, there is no evidence—

Mr. Wagner:

Then they are resting—

The Court:

—and I sustain a motion for verdict as to that portion of it, but I will consider that you have filed your motion as to the remainder of it and overrule it and you may have your usual motion, I assume that is what you wish.

Mr. Wagner:
We want to file it.

The Court:
All right, are you going to file it or dictate it?

Mr. Wagner:
(Conferring with Clerk, out of hearing.)

Mr. York:
May it please the Court, we would like, at this time, to move for an election on the part of the defendants, in view of the fact that they haven't pleaded truth in any way other than by general denial, as to what part of these statements they are going to rely on as being true and or what part of them they are going to rely on as being denied, that is the making of them being denied. The things we came up with at the opening statements here. We have still no indication—

The Court:
Well, it is my understanding they deny making any of the statements exactly as you allege or as has been testified by your witness. I will overrule the motion to elect at this time.

Mr. York:
Unless they deny making, in substance, what we have alleged they made, the question of whether what they did make was true or not would be immaterial, may it please the Court. We still don't have any notice—

The Court

Well, I am not going to require them to elect at this time. All right, you may file this motion and it is overruled.

Mr. Abbott:

Your Honor please, I renew my motion in connection with the testimony of this witness, that I made yesterday. I will restate it if the Court cares.

The Court:

What was that, now?

Mr. Abbott:

I want to renew my motion that I made in connection with the testimony to be adduced from this witness, and that is that he should not be permitted to testify in this case unless it is first shown that the Bureau of Weights and Measures, of which he is an employee, has authority to intercept shipments in interstate commerce and assume jurisdiction over them, or any civil authority.

The Court:

Well, I will overrule the motion. I haven't heard the testimony yet. All right.

JAMES DOLAN, having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Wagner:

Q. What is your name, sir?

A. James Dolan.

Q. Where do you live, Mr. Dolan?

A. I live in New York.

Q. Are you connected with any official agency of the City of New York?

A. Yes, I am an employee of the Department of Markets, Bureau of Weights and Measures, City of New York.

Q. Now, will you speak up—if you will, speak to this lady back here, then everyone will be able to hear you. The Department of Markets, Bureau of Weights Division, is that what you testified?

A. The Bureau of Weights and Measures is a bureau in the Department of Markets.

Q. Yes, and how long have you been connected with the Bureau of Weights and Measures department?

A. I have been an employee over twenty five years.

Q. Do you have one of the bureau's files with you that you brought down?

A. Yes, I have.

Q. You can refresh your memory from that, if you will, and—was a complaint received from F. H. Vahlsing on or about July 26, 1954, at the Bureau of Weights and Measures?

A. That is correct, sir.

Mr. York:

Please the Court, we object to that. This witness hasn't been qualified to testify to what was received at the Bureau of Weights and Measures or any other department.

The Court:

I wouldn't think so, unless he was the custodian—wasn't testifying as the custodian of the records.

Mr. Wagner:
Withdraw the question.

The Court:
Don't consider the answer, lady and gentlemen.

Q. Did you have anything to do with the investigation of some bags coming from the plant of Roto-Lith, Limited, on August 2nd, 1954?

The Court:
You, personally.

A. Yes, I did.

The Court:
What was the date of that?

Q. August 2, 1954. State whether or not you went to the Roto-Lith, Limited, plant.
A. I did.
Q. Where is it? Where was it?
A. 32 West 13th Street, New York City.
Q. Were you accompanied by anyone?
A. I was.
Q. Who?
A. I was accompanied by Mr. Fred Meyer.
Q. That is the gentleman sitting here at the counsel table?
A. That's correct, and two other inspectors from the Bureau.
Q. And state what you observed there.
A. I observed boxes being loaded on a truck which was brought there by Mr. Fred Meyer, one of his men.

Q. Did you see some boxes loaded from the plant onto the truck?

A. I did.

Q. And did the truck then depart?

A. It did.

Q. And what did you do?

A. I took the truck and its contents to our testing station, where I weighed all the boxes and marked them, one to two fifty seven.

Q. Did you retain, in your possession, or the possession of the Bureau, any of those two hundred and fifty seven boxes?

A. I retained twenty four of those boxes and put them in the testing station.

Q. And what was done with reference to those twenty four boxes?

A. They were counted, the bags were counted.

Q. I believe Mr. Donahue was in charge of the actual counting, was he not?

A. Yes, sir.

Q. Well, I just wanted to know—

Mr. York:

We will move to strike the answer, then.

Mr. Wagner:

What?

Mr. York:

Mr. Donahue was in charge of the counting and this witness has testified they were counted.

Q. Do you know whether they were counted or not?

A. Yes. I do.

The Court:
How do you know?
A. Because I received a copy from Mr. Donahue, giving me a result of the count.

Mr. Wagner:
Your Honor, I have Mr. Donahue here. He is going to testify. I just wanted to know if this was the man that counted them.

The Court:
Well, he is not the man that counted them.

Mr. Wagner:
No, he is not, that's what I said.

The Court:
All right.

Mr. Abbott:
We move to have his answer stricken as to the fact that they were counted.

The Court:
I sustain the objection.

Mr. Abbott:
And further, Your Honor, I would like—

Mr. Wagner:
Withdraw the question.

Q. State whether or not you saw any counting going on.

The Court:
Let him finish. Let him finish. He is making a motion of some kind.

Mr. Abbott:
I would like, also, at this time, to have the defense produce this complaint that they are talking about.

Mr. Wagner:
Well, I will offer it in evidence.

Mr. Abbott:
Please.

Mr. Wagner:
Let me have it. I will offer the whole Bureau file in evidence.

Mr. Abbott:
Well, let me look at it.

Mr. Wagner:
You have seen it.

Mr. Abbott:
No, no, not all of it.

Mr. Wagner:
Well, you talked to Dolan about it yesterday.

Mr. Abbott:
All right. Your Honor please, I would like to make some objections to the offer of introduction of this file.

The Court:
The offer and introduction of what?

Mr. Abbott:
Of this evidence, on the part of the defendant. It is referred to as the file of the Bureau of Weights and Measures.

The Court:
Well, he hasn't offered it. You called for it,—

Mr. Abbott:
Yes, I did, Your Honor.

The Court:
—for the complaint.

Mr. Wagner:
He asked for the complaint and I said, "Well, I will offer it in evidence," and he said, "All right," and I said, "Well, I will just offer the whole file."

The Court:
All right, I sustain the objection at this time.

Mr. Wagner:
Well, what objection—

Mr. Abbott:
I object to the introduction of this, first, on the ground that it hasn't been shown that this man had any connection with the preparation of all of these papers; second, that one of these papers in here refers to a complaint and requests received, and it refers to "S-W on purchase of polyethylene bags," and

he is attempting to testify now to short count, not to short weight, which I assume "S-W" means. I think the testimony is clearly out of the scope of his inquiry.

The Court:
Well, I overrule that objection.

Mr. York:
No attempt has been made to qualify it as the Bureau file, Your Honor.

The Court:
Well, I agree with you on that, but you called for the complaint and—

Mr. Abbott:
I wanted to examine it.

The Court:
—I don't think it is proper to offer it just because you ask to see it. Let's go along with this witness now.

Mr. Wagner:
I didn't think I was holding it up, Your Honor.

Q. What are those papers you have in your hand?
A. Part of this is the original—

Mr. York:
May it please the Court, that is the file that he is talking about and this man hasn't testified to any sort of a predicate to where he could be—.

Mr. Wagner:
Well, he can't testify to a predicate unless you let me ask him.

Mr. York:
I beg your pardon, Mr. Wagner.

Q. What are those papers, Mr. Dolan?
A. Part of this is the original complaint that was received by me, to make the investigation.
Q. And that is it you have right there?
A. Part of it. More of it is the report that was submitted by me after the investigation, and other parts of it is the report from Mr. Donahue, who made the count of the bags.
Q. Now, that report from Mr. Donahue, that made the count on the bags,—

Mr. Abbott:
Your Honor please, we move to strike any reference to Mr. Donahue having made the count on the bags because the witness has already stated that he doesn't know, he didn't see the bags counted.

The Court:
I sustain the objection.

Q. All right, let me ask you this, are you in and out—did you actually see any bags being counted under Mr. Donahue's supervision?
A. Yes, I did.
Q. This was quite a big operation, wasn't it?
A. It was.

Q. They ended up counting those whole two hundred and fifty seven boxes, a total of about how many—

Mr. York:
The witness has already said that he did not see all of them counted.

Mr. Wagner:
That's right, but he knows something about it.

The Court:
I will overrule the objection, now, he says he saw them counting them, so—

Mr. York:
He saw them counting some of them.

The Court:
Well,—

Q. Now, you don't purport, yourself, to be in a position to swear to the accuracy of the count, do you?
A. No, I do not.
Q. But you did see the thing going on there for days and days?
A. I saw the operation. I wasn't there all the time, but I saw the operation.
Q. And as a part of your official duties, you have seen the report made on that subject by Mr. Donahue?
A. That's correct.
Q. And that is his report attached there?
A. That's correct.
Q. Is that an official record of your Bureau?
A. It is.

Q. Is it made up in the regular course of the operation of that Bureau?

A. It is.

Q. The reports on there, where you served the violation on Mr.—there is a report on there, is there not, about the service of a violation on Mr. Borak?

A. Yes, I believe there is. That's right.

Q. And that report was made up by you and your partner. Who was your partner, Gray?

A. Gray was the one who actually wrote the report.

Q. But you were present?

A. I was the supervisor in this instance and I approved the report that was submitted.

Q. And is that the original record of the Bureau in connection with this operation?

A. That is correct, sir.

A. And the entries in it were made in the regular course of the operation of that Bureau?

A. That is correct.

Mr. Abbott:

Your Honor please, he is testifying as to entries made by other parties.

Mr. Wagner:

That's right.

Mr. Abbott:

I don't see how he could know they were regular entries made in the course of the business of the Bureau.

The Court:

A Bureau is not a business, that doesn't come under the business statute, this is a government record, as

I understand, of the state government, and must be attested in the form prescribed by the statute.

Mr. York:
We object to any further testimony along these lines, Your Honor, because—

The Court:
I sustain the objection as to any entry not made by this witness, and there is a way to get state records properly certified to. The records of a sister state are not the records made in the course of a business, as contemplated under the federal rules.

Q. Now, this original complaint, this white paper, was that taken by you?
A. No, it was not.

Mr. Abbott:
If Your Honor please, didn't you sustain the objection to the introduction of these documents,—

Mr. Wagner:
I haven't offered them yet.

Mr. Abbott:
—to further testimony relating to the documents.

Q. You did supervise, if I understood you, the weighing of each of these two hundred and fifty four boxes?
A. I did.
Q. Fifty four or fifty seven?
A. I did.

Mr. Wagner:
Where are those yellow sheets? Would you mark this, please, sir?

The Clerk:
Yes, sir. That will be D-7.

(Whereupon Defendant's Exhibit No. 7 was marked for identification.)

Q. I will hand you a document of three sheets, Mr. Dolan, and ask you to examine those three sheets and say if your signature appears on each of them.
A. It does.
Q. What is the information on those three sheets?
A. This contains the number, from one to two fifty seven, on the weight of each box.
Q. And where was the information obtained to put that weight on each box?
A. The boxes were weighed by me, on—

The Court:
What?
A. The boxes were weighed by me, on August the 2nd.
Q. On what scales?
A. On the scale-taken from the testing station, our testing station.
Q. Your official scale?
A. That's correct.

Mr. Wagner:
We will offer D-7.

Mr. York:
We have one question, on Voir Dire, with Counsel's agreement, if the Court please.

The Court:
All right.

Mr. Wagner:
Perfectly all right with me, Your Honor.

Voir Dire Examination.

By Mr. York:
Q. Did you go in that truck that you are talking about, to the loading platform, where you saw these boxes loaded, to your official testing station, you drove that truck yourself?
A. No, I did not.
Q. Were you in the truck?
A. No, I was not.
Q. I understood you to testify that you went in the truck.
A. No, I didn't say any such thing, sir, to my knowledge.

The Court:
All right, proceed.

Mr. York:
We object to it as not being—the chain of possession hasn't been shown there from the loading platform, there is no evidence as to what happened between the loading platform and the time that Mr. Dolan received them at the station, where he weighed them.

The Court:
Overruled.

Mr. Wagner:
Let me ask a question.

The Court:
Overruled.

Mr. Wagner:
Oh, thank you. Gentlemen, I won't take time to read all of this. It is just a bunch of figures. What does that "1500/BOX" mean at the top?

A. That is what each box was supposed to contain.

Q. That was the markings on the box, "1500"?

A. Yes, sir.

Q. Were the boxes numbered, that is one to two fifty seven, were those numbers assigned by you—

A. That's correct.

Q. —or did—

A. No, I assigned the numbers to them.

Q. Do you have there the violation that was served on Mr. Borak?

A. I do.

Q. What do you do when you serve a violation?

A. Well, we issue a slip to the person who committed the violation.

Mr. Abbott:
Is that—pardon me—I don't want to make an objection, I just want to understand what the witness is referring to a violation or a complaint.

Mr. Wagner:
He said a violation. This happened after they had counted the bags.

Mr. Abbott:
All right.

Q. What is done when you serve the violation?
A. Well, after a violation has been found, a blue slip is issued to the person committing the violation, asking him to appear at our office for a hearing.
Q. And is that the copy of the blue slip?
A. This is the original copy.
Q. This is the original. And was Mr. Borak given a copy of that blue slip?
A. He was.

Mr. Wagner:
We will offer it in evidence. Ask that this be marked, Mr. Clerk.

(Whereupon Defendant's Exhibit No. 8 was marked for identification.)

Mr. Abbott:
May we see it, counsel?

Mr. Wagner:
Sure (passing instrument to counsel).

Mr. Abbott:
Your Honor please, I would like to object to the admissibility of this document because it is a complaint or it is a violation on short count on polyethlene bags; the complaint that was filed was on short weight; I made my original objection on—that is the original complaint that they had. Now they come in with a violation on short count.

The Court:
Well, overrule the objection.

Mr. Wagner:
May I have the Court's permission to substitute a photostatic copy for this original?

The Court:
Yes, at your cost.

Mr. Wagner:
I already have it, Your Honor.

Q. When you serve a violation, do you make any request of the person upon whom you serve it, for signature or anything of that sort?
A. Well, we request a signature acknowledging receipt of the violation.
Q. Did you request Mr. Borak to acknowledge receipt of the service of that violation?
A. I did.
Q. Would he sign it?
A. He did not.
Q. Did he say anything to you and your partner when you served that violation on him? What was his attitude?

Mr. Abbott:
Now,—

The Court:
Did he say anything, now, wait a minute, I will let him—

Mr. Abbott:
Yes, Your Honor.

The Court:
—tell what he said,—

Mr. Wagner:
All right,—

The Court:
—I will let him describe him, but not—

Mr. Abbott:
All right, let me ask him this way,—

The Court:
Wait a minute. Did he say anything?

A. Yes, Your Honor, he did.

The Court:
All right, tell what he said.

A. Well, he told me I had no right to come into his place of business and accuse him of cheating and larceny.

Q. Had you accused him of cheating and larceny?

A. No, I did not.

Q. What was his manner of acting?

A. Well, he talked to me in a very arrogant, loud and boisterous manner.

Q. I think a hearing was held on some date, wasn't it, about August 20th, wasn't it?

A. I believe that is the correct date.

Q. Were you present?

A. I was.

Q. Was Mr. Borak there?

A. He was.

Q. Was he accompanied by his attorney, Mr. Joseph?

A. Yes, I believe—I believe that was the gentleman's name.

Mr. Wagner:

Uh huh. I think that's all.

The Court:

Cross examine?

Mr. Abbott:

Yes, sir.

Cross Examination.

By Mr. Abbott:

Q. Mr. Dolan, when you went in to see Mr. Borak, you say you had a complaint for a civil violation—

A. I told Mr. Borak I had made an investigation as a result of a complaint, I had weighed some of his polyethylene bags and I found a shortage.

Q. Found a shortage?

A. Yes, sir.

Q. Now, that is what you said to him?

A. That's correct.

Q. Now, that was when he said that you had no right to come in and charge him with being a—doing these things?

A. Well, I told him I was issuing a violation for him to appear at our office for a hearing.

Q. All right, sir. Now, how many complaints did you have, just the one?

A. Now, when you talk about a complaint sir,—
Q. Or a violation.
A. Yes, I issued one slip to him.
Q. You issued one slip?
A. That's correct.
Q. As a matter of fact, Mr. Dolan, you had two complaints, didn't you?
A. Two complaints?
Q. Yes, one on rolls and another one on the short weight on the bags, the finished bags?
A. At the time the polyethylene bags were delivered, there were some rolls also delivered at the time.
Q. Yes. Now, just answer my question, isn't it true that you had two complaints and two civil violations, one applying to rolls and the other to bags? Is it or is it not true?
A. My violation originally stated, "Short count on polyethylene bags, short weight on rolls."

The Court:
Well, the answer is two, you had two, the answer is two.

A. That's correct, sir.

The Court:
All right.

Q. Thank you. Now, what happened when you mentioned, that there was some short weight on roll stock that had been delivered in this shipment?
A. Mr. Borak called up the Vahlsing people and spoke to Mr. Meyer.
Q. Now, who called up?

A. Mr. Borak, called Mr. Meyer on the phone.

Q. Called Mr. Meyer?

A. That's correct, and he asked me to speak to Mr. Meyer.

Q. All right, sir, and did you do so?

A. I did?

Q. And what did you find out?

A. Well, there was some understanding or misunderstanding, I don't know which, between Mr. Meyer and Mr. Borak, about the delivery on the rolls, and I do not recall exactly the conversation with Mr. Meyer at that time, but as a result of the conversation, I scratched out the violation on rolls.

Q. Now, did you really scratch it out or did you just tear it up?

A. Tear up what?

Q. The civil violation on the short weight on rolls.

A. Sir, we don't tear up violations.

Q. Just answer my question, isn't that what you did?

A. No, sir, absolutely not.

Q. You didn't tear it up?

A. No, sir.

Q. What did Mr. Borak say to you at that time about what should be done about the return of that civil violation on the weight on rolls?

A. I don't recall anything he said to me about that.

Q. Now, what was the result of your conversation with Mr. Meyer, that there was more weight in rolls delivered than the bill of lading called for, isn't that right?

A. I don't recall the exact conversation, but—

Q. But—

A. But there was—

Q. Wasn't that the result, Mr. Dolan?

A. The result was that I eliminated short weight rolls from the—from the violation.

Q. Oh, I see. You don't remember, though, that it was overweight, you just eliminated it?

A. According to the bill that was presented at the time, which indicated weight, to my best recollection, the rolls were short.

Q. But you found out different, didn't you?

A. Well, there was something in the conversation that—

Q. Just answer my question, please, sir. You found out differently, didn't you?

Mr. Wagner:

No, it is not necessarily—

The Court:

Well, now, he will answer it for him. He can answer the question.

A. Was something in the conversation with Mr. Meyer—

Q. Answer my question, please, sir. You found out differently in your conversation with Mr. Meyer, didn't you?

A. Well, the conversation with Mr. Meyer led me to believe that a violation should not be issued for that.

Q. But it had been?

A. It had been, that's correct.

Q. That's right, by you. Now, you say that you saw this counting operation going on down at the Hall of Records, is that correct?

A. I saw in the process—I saw them working on it.

Q. Now, how long did this take place?

A. Oh, it was several days.

Q. Several days?

A. Uh huh.

Q. Was that on the twenty four boxes?

A. I don't know how long it took on the twenty four boxes. I am speaking about the over-all count.

Q. Well, you originally counted twenty four boxes, didn't you?

A. That's correct.

Q. You selected boxes out of this group that you had weighed and you counted them?

A. That's correct.

Q. And that was the basis for your filing a civil violation on short count?

A. That's correct.

Q. When, in truth and fact, the original complaint was on short weight, and you made an investigation on short count, isn't that correct?

A. Well, do you want me to explain that, sir?

Q. I want you to answer "Yes" or "No," please, sir.

A. The complaint—

Q. Now,—

A. The complaint would indicate short weight, that's correct.

Q. And yet you issued a civil violation on short count?

A. Well, on your—

Q. Isn't that right?

A. The boxes—

Q. Answer—isn't that—

A. Yes that's right.

Q. All right. Thank you. Now, you have lived in New York a great number of years and been employed twenty five years, rather, by the Bureau?

A. That's right.

Q. You have dealt with the Vahising people many times before, haven't you?

A. No, I have not.

Q. Never have?

A. Yes, I have, on one occasion.

Q. On one occasion before. When was that?

A. Sometime prior to August 2nd.

Q. Sometime prior to that. Now, when you issue a civil violation, that is more or less like issuing a traffic ticket, "You are to be before the judge at a certain time for a hearing on this matter," isn't it?

A. Well, this is a civil action, of course.

Q. Yes, but it is about tantamount to being a summons or a notice of a violation that you have found and for the man to appear before a commissioner or some board for a hearing?

A. It is for a hearing before the commissioner.

Q. Now, as a matter of fact, your investigation into this was ex parte, that was by you and your staff, Mr. Borak never did have an opportunity to examine or count those bags prior to the time that you issued the civil violation, did he?

A. Not to my knowledge.

Q. It is just something that you and your Bureau undertook to do?

A. That's correct.

Q. And then, on the basis of what you determine, you issue a civil violation, and then, according to that, he has the burden of disproving what you have found, isn't that correct, sir?

A. That's right.

Q. Mr. Borak was not present—

A. Not to my knowledge.
Q. —when you went to count the bags?
A. Not to my knowledge.
Q. All right, sir. Now, you stated that the hearing was held on August 28th, before the commissioner.
A. Yes, sir, that is the date.
Q. Now, as a matter of fact, that was the hearing for this violation that you had found?
A. That is right.
Q. Did you bring up, at that time, that you had torn up the civil violation on the short weight of the rolls?

Mr. Wagner:
Objected to on the ground that the witness has testified just to the opposite of counsel's assumption that he tore it up.

Q. All right, what happened to the violation, the civil violation that you wrote out on short weight, is it in your file?
A. Yes, sir.
Q. Let me see it, please, sir.
A. (Passing instrument to counsel.)
Q. You merely—this is the original?
A. Yes, sir.
Q. And you have drawn—knocked out the line that says "Short weight on roll;"?
A. That is correct.
Q. That was the action you took?
A. That is correct.
Q. Now, when you had the hearing on August 28th, what happened at that hearing?
A. The final result of the hearing?

Q. No, what happened at the hearing? Isn't it true that you had this violation for short count, although the complaint was filed on short weight, on these bags, that you had filed a civil violation for short count?

A. That is right.

Q. And isn't it also true that at that time, that Mr. Borak insisted that the entire shipment be counted.

A. I don't think Mr. Borak insisted that it be counted.

Q. Were you there during the whole conversation before the commissioner?

A. I was.

A. Let me ask you this question, on the twenty three bags that you found, upon which you based your civil violation, what percentage of shortage did you find?

A. I think the violation—the shortage was approximately fourteen per cent.

Q. Fourteen per cent?

A. Yes, sir.

Q. Now, thereafter, isn't it true that Mr. Borak refused to accept any finding regarding that shortage of fourteen per cent and insisted that every box be counted?

A. Mr. Borak claimed that on the over-all delivery, there wouldn't be any shortage.

Q. All right.

A. And our director, Mr. Loughran, volunteered to count all the bags, have them all counted.

Q. Well, he volunteered because Mr. Borak said that, on the over-all, it wouldn't show that shortage, didn't he?

A. He claimed—

Q. Anyway, it was because of Mr. Borak's insistence, wasn't it?

A. I cannot say that, but he did insist.

Q. You feel that it was done because Mr. Borak wanted it done?

A. Well, the commissioner wanted to be fair, he wanted to give him a chance to prove—

Q. And then what was the outcome of that fairness?

A. Well, the final shortage was 2.92%, I believe.

Q. In other words, instead of being 14%, as you charged in your civil violation, it was 2.92%, wasn't it?

A. That was the final result, sir.

Q. That is under three per cent, isn't it, Mr. Dolan?

A. Yes, sir.

Q. And thereafter, what action was taken by the commissioner?

A. What action?

Q. With respect to the 14% alleged violation.

A. What action was taken on the violations?

Q. Yes, sir, what happened to the civil citation?

A. Well, action was discontinued by the commissioner.

Q. It was, and in your office, when you say "discontinued," that means it was dismissed?

A. Well, it is not a dismissal.

Q. Can you answer that "Yes" or "No"?

A. I would say it is not a dismissal.

Q. Now, if Mr. Loughran says that it is a dismissal, who would be correct, you or Mr. Loughran?

A. Well, that is—discontinued is the word he used on the violation, and I have always heard it referred to, "Action discontinued."

Q. That's right, throughout your tenure in that

office, they use that term?

A. That's correct.

Q. Every predecessor in office has used that term, and another way of saying it, it is a dismissal because no action is taken, isn't that correct?

The Court:

Well, it means it is over with, doesn't it?

A. That's correct.

The Court:

When they mark "Discontinued" on there,—

A. Discontinued.

The Court:

All right, I will—

Q. And you did not fine them, did you?

A. AThere was no fine.

Mr. Abbot:

Thank you. No further questions.

Re-Direct Examination.

By Mr. Wagner.

Q. Now, on that matter of what action the commissioner took, he received a telephone call from Mr. Vahlsing that they had settled with him, did he not, that Borak had settled with him?

A. That is correct.

Mr. Abbott:
Your Honor, I don't see how this witness could know anything about that unless he received a call.

Mr. Wagner,
Well, it is a part of those official records, isn't it?

The Witness:
That's correct.

Mr. Abbott:
Your Honor, I have objected to the introduction of these official records.

The Court:
Well, he asked him did he receive a call, Did you receive a call from Mr. Vahlsing?

A. No, I did not, sir.

The Court:
I sustain the objection.

Q. You keep wanting to explain the difference in your mind between a dismissal and a discontinuance. Wasn't the word you used "Discontinued"?
A. Discontinued is the word commonly used.
Q. How do you understand the effect of a discontinued action?

Mr. Abbott:
Your Honor, I object to how he understands anything.

Mr. Wagner:
That is what he asked him, Your Honor.

The Court:

I think it has been gone into far enough, It is just one—six of one and half a dozen of another, gentlemen. That is the reason I broke in on counsel for the plaintiff a while ago. It is all over, whether it is dismissed or discontinued.

Mr. Wagner:

No, Your Honor, it isn't the same thing, I insist.

The Court:

Well, I still sustain my own objection and the plaintiffs' objection. We have had enough of that. It is all over.

Q. This D-8, Mr. Dolan, is that the violation slip on which you point out that you scratched out that short weight on rolls violation charge?

A. That is correct.

Q. That is the very one. Now with reference to this truck proceeding from the Roto-Lith plant down to your testing station, you say you did not ride in the truck itself?

A. No, I did not.

Q. Well, was it within your observation and—all the time?

A. I trailed the truck with my car all the way from the Roto-Lith to the testing station.

Q. You say you trailed it in your car?

A. That's right.

Q. And nobody—

A. Not in my car, it is a car that belongs to New York City, City of New York.

Q. All right, city car, but the point we are getting to is this, did anybody take those boxes and take some bags out of it between the plant and where you got them down to your Bureau?

A. No, sir.

Q. He asked you about if you had ever had any other contact with the Vahlsing organization and you said "On one other occasion"?

A. That is correct.

Q. Was that in connection with an inquiry as to whether bags by some other supplier were short or not?

A. It was.

Q. And did you follow this same procedure and test a product from some other converter?

A. I did.

Q. And what was the result of that investigation?

Mr. York:

If the Court please, that has no bearing on the case.

Mr. Wagner:

I think it does, Your Honor. I am not proposing to go into details about it, I am only asking for the—

The Court:

I'm sorry, I didn't get the exact question.

Mr. Wagner:

They asked him if he had had any other contacts with the Vahlsing organization and he has testified, up to this point, that, "Yes," that they checked the bags from another bag manufacturer, at Mr. Vahlsing's request, and I asked him now, the final ques-

tion, what they found about that other converter's bags, with reference to being short.

The Court:
Another manufacturer?

Mr. Wagner:
Yes, Your Honor.

The Court:
I sustain the objection.

Q. Well, Your Honor, may I—

The Court:
Immaterial, wholly immaterial.

Mr. Wagner:
Well, may I prove it for my bill, because I am going to ask the Court to let me let these men go back to New York, and—

The Court:
All right, I will take care of it at the recess, when we get through with this witness.

Mr. Wagner:
All right.

Q. The over-all count on the two hundred and fifty seven boxes was 2.92% practically 3, is that right?
A. That is right, sir.
Q. Is that a violation?
A. It is.
Q. How—

Mr. Abbott:

Your Honor, I object to that answer. He has already stated that action was discontinued on this civil violation and now he states that it is a violation.

Mr. Wagner:

That's right, and I want to explain.

The Court:

Well, I am not going to go into whether it is a violation or not, of the city laws of New York. I have no proof of what they are, I don't know, and I sustain the objection; don't consider the answer, gentlemen, that it was a violation.

Mr. Wagner:

That's all.

Mr. Abbott:

I have just—

The Court:

Keep your seat. Now, haven't you had him long enough? You have had him twice on each side. All right. We are going to take a recess, a fifteen minute recess, lady and gentlemen. Do not discuss the case don't permit anybody to discuss it in your presence. The Court will remain in session. Everybody stay seated until the jury has retired.

Mr. Wagner:

Hey, Dolan, take your seat. I want to prove up what you would testify to.

The Court:

I didn't excuse the witness. Everybody stay seated until the jury has retired.

(Whereupon the jury retired from the Courtroom and the following proceedings were had outside the hearing of the jury.)

The Court:

All right, now, you want to show by him the result of the other investigation of another company?

Mr. Wagner:

Yes, Your Honor.

The Court:

All right, make your record.

Re-Direct Examination.

By Mr. Wagner:

Q. Mr. Dolan, on this other occasion, was that also in the company of Mr. Fred Meyer?

A. It was.

Q. And you went to another converter's factory and followed some boxes into a truck and down to the weighing station, is that correct?

A. That's correct.

Q. And were they counted to determine whether the boxes contained the number of bags in them that they were stamped to contain?

A. They were.

Q. And what was the result of that investigation?

A. They were found to be accurate.

Q. Now, with reference to accurate and the matter of what is considered a violation and what is

not, is there a percentage that is allowed for human or mechanical error that will not be treated as a violation?

A. Well, there is what we call a tolerance.

Q. All right, a tolerance, that's the point. Now, is there a tolerance that is permissible?

A. Yes, there is.

Q. And what is that tolerance?

A. Well, on certain commodities, there is a specified tolerance,—

Q. Yes.

A. —and anything that is not specified, there is a tolerance of two per cent.

Q. Two per cent. And what is the tolerance applicable to polyethylene bags?

A. The two per cent tolerance would take effect.

Q. In other words, you have a box that was two per cent under, you wouldn't charge a violation on that?

A. Not on one box.

Q. Not on one box, but suppose you had a hundred boxes and they were all two per cent under?

A. Well, tolerances, in all cases, it states, the tolerance law, that they shall be as often above as below. That, too, sir is for human error, mechanical error, in the packing.

Q. But you say they shall be as often over as below?

A. That's correct.

Q. In other words if, in a given lot of a hundred boxes, you found twenty five two per cent under, if you also found twenty five two per cent over, then it wouldn't be violation?

A That's correct.

Q. Now, with reference to this matter of the violation being discontinued, Mr. Dolan, I will ask you if the effect of discontinuing the action isn't to leave the matter pending there as a warning to the person against whom the violation was filed, so that if a subsequent violation is filed on him, the pending one would be taken as a warning to him prior to his second violation?

A. Well, it is considered a warning. Of course the—"Discontinued" means that corporation counsel, which represents the city of New York, does not proceed against the person to whom the violation is issued.

Q. And this particular violation was not discontinued until after it was reported to the Bureau that Borak had settled with Vahlsing?

Mr. Abbott:
Your Honor, I would like—

The Court:
He is making his bill. He is making his bill.

A. The record indicates that—now, this in the Director's handwriting,—

Q. Yes.

A. —"on ten thirteen fifty-four, Mr. Vahlsing Junior advises me that matter has been settled to their satisfaction."

(Whereupon Defendant's Exhibit No. 9 was marked for identification.)

Q. And then is there an entry on that report for ten fourteen fifty-four?

A. There is.

Q. Whose handwriting is that in?
A. That is in Director Loughran's handwriting.
Q. And what does it say?

(No answer heard.)

Mr. Wagner:
I'll tell you, no use you reading it. For the purpose of the bill, Your Honor, I will offer this special report that has been marked D-9.

Q. Is that one of the official records of the Bureau of Weights and Measures of the City of New York?
A. It is.
Q. Are the entries thereon made in the regular course of the operation of that bureau?
A. They are.
Q. And you recognize the handwriting of the October 13th and October 14th entries as being those of the Director at that time?
A. I do.
Q. And were they made by him on this record as a part of his official duties?
A. That is correct.

The Court:
All right, you have got your bill.

Mr. Wagner:
Yes, Your Honor. Thank you.

The Court:
All right, we will recess.

(Whereupon a fifteen minute recess was taken.)

Mr. Wagner:
Do you have the Bureau file with you?

Witness Donahue:
Have what?

Mr. Wagner:
Did you get the Bureau file from Dolan?

Witness Donahue:
No, I didn't get it from him.

Mr. Wagner:
Somebody go get it, will you?

Witness Donahue:
I have a duplicate, but that wouldn't do.

Mr. Wagner:
Duplicates?

Witness Donahue:
Yes.

Mr. Wagner:
Well, let's have the original.

MATTHEW A. DONAHUE, having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Wagner:
Q. What is your name, sir?
A. Matthew A. Donahue.

Q. Where do you live, Mr. Donahue?
A. 11 Riverside Avenue.
Q. But what city?
A. Baldwin, New York.
Q. Baldwin, New York?
A. Baldwin, B-a-l-d-w-i-n.
Q. Are you connected with any department of the City of New York?
A. I am.
Q. What department?
A. The Department of Markets, Bureau of Weights and Measures.
Q. And how long have you been connected with that department?
A. Forty five years.
Q. In the early part of August, did you have occasion to test—

Mr. Abbott:
Your Honor please, I would like to make an objection to the evidence to be given by this witness. It has already been shown by the prior witness of the same Bureau that the action was discontinued and I see no materiality of going into it any further.

The Court:
All right, overruled.

Q. Did you have occasion to test a number of boxes of polyethylene bags of Roto-Lith, Limited?
A. I did.
Q. I hesitate to have you talk about quantities until you have that file before you. Did you supervise the counting of a large number of boxes?
A. I did.

Q. Do you have your records there from which you can testify as to the results of that count?

A. I have.

Q. Would you get them before you, please, sir?

Mr. Abbott:

Your Honor please, may I take the witness on voir dire for a moment?

The Court:

All right.

Voir Dire Examination.

By Mr. Abbott:

Q. Mr. Donahue, did you count the bags in the boxes that you are going to refer to now?

A. I supervised the counting.

Q. Did you count them?

A. Some of them.

Q. And you didn't count all of them?

A. Not personally.

Q. You are now speaking of 257 boxes, aren't you?

A. That's right.

Q. And you did not count those?

A. No, sir.

Q. So you don't know, of your own knowledge, what was in those boxes, do you?

A. Yes, sir, I do.

Q You do?

A. Yes sir.

Q. But you didn't count them?

A. I checked them, each one individually.

Q. You checked each box individually?

A. Yes, sir.

Q. Is that the same as counting them?

A. I didn't count each individual bag, but I did count samples from each ten bags that were counted and piled up.

Q. You did count the samples?

A. Samples. Not every—for instance I would have ten tens piled this way, I would count maybe one or two of those tens.

Q. I see. So you didn't make a full and complete—

A. No.

Q. —and accurate check—

A. No.

Q. —of the numbers in the box?

A. No.

Q. And how many people were engaged in this?

A. Oh, we had various numbers, from eight to maybe ten, twelve, fifteen, according to the way they were needed in the main office.

Q. It took you three days to do it, with probably ten or fifteen men working all the time?

A. Yes, it took us at least three days.

Q. And you didn't count them yourself?

(No answer heard.)

Mr. Abbott:

I renew my objection, Your Honor, to the testimony as to the count in the boxes.

The Court:

I will overrule the objection.

Direct Examination (Continued).

By Mr. Wagner:

Q. Would you describe for us, Mr. Donahue, the system that was used in this count?

A. We had long tables—we have long tables down there for testing the lint of various commodities, such as cloth and things like that, tables similar to these but longer, maybe—well, they were fifteen feet long, they are, standard fifteen foot measures on there. I assigned a man to this place here, for instance, this part of the table, he would count ten bags down this way, ten bags that way, then he would count ten bags and lay them this way, he would continue that until he had ten tens counted, then he would start another pile, ten, ten, ten, and continue that way until the box was counted, then he would call me, I come over and I would take a check on this bunch and on this bunch and then I would count the whole thing, set them altogether and number that, that was number 157 box, for instance.

Q. I will hand you those documents and ask you to get them before you. Was there a record made as to the result of this count?

A. There is. There was. I have it right here.

Q. Would you refer to that list of September 9, 1954? Perhaps before I get to that, before undertaking the count of the entire 257 boxes, did you count a smaller number out of this lot?

A. I did.

Q. How many were first counted?

A. Twenty four.

Q. Twenty four. And, on the basis of that count, did you find a short count?

A. I did.

Q. What percentage of short count did you find on counting the twenty four alone?

A. I made two counts on that.

Q. All right.

A. The first count showed a shortage—

Mr. Abbott:

Your Honor please, I would like the record to show that when he says "I counted them," he is referring to the men under his supervision. If that is correct.

The Court:

All right, I am sure that is the effect of his answer.

Mr. York:

Our objection goes to the whole line of testimony, if the Court please. We don't want to keep making it.

The Court:

All right.

Q. You say on the first count of those twenty four boxes, you determined a shortage of how much?

A. Fourteen per cent. Fourteen per cent.

Q. Then subsequently, the entire 257 boxes were counted, is that correct?

A. Yes, sir.

Q. And did you recount those initial twenty four?

A. I did.

Q. And on the recount of the initial twenty four, what percentage of shortage did you find?

A. A trifle over thirteen per cent.

Q. Uh huh. In other words, there was something less than one per cent difference between the two counts?

A. Approximately, within a fraction.

Q. Now, on the count of the entire lot of 257 boxes, what percentage of shortage was found?

A. 2.92%.

Q. Did you have occasion to be in the office of Mr—what was the commissioner's name, Loughran, is it?

A. Loughran, L-o-u-g-h-r-a-n.

Q. —when he received a telephone call from Fred Vahlsing Junior, about this matter?

A. No, sir, I wasn't there at the time.

Q. It was reported to you?

A. It was reported to me and—

Mr. Abbott:

Your Honor, that is clearly hearsay, reports to him of a conversation.

Mr. Abbott:

I have not asked him what the conversation was.

Mr. Wagner:

The fact it was reported to him is—

Mr. Wagner:

That is not hearsay.

The Court:

What was your question?

Mr. Wagner:

I asked him, Your Honor, if it had been reported to him that Mr. Vahlsing Junior had phoned the commissioner with reference to this matter. I haven't asked him what Mr. Vahlsing Junior said, but only

the fact that a phone call from Vahlsing Junior to the commissioner was reported to him.

The Court:
All right, I will let the answer stand.

Mr. Abbott:
And he was not present.

Mr. Wagner:
That's right, he said he wasn't present. I think that's all.

Cross Examination.

By Mr. Abbott:

Q. Mr. Donahue, I have talked with you, in New York, about this matter, before, is that correct?

A. You said so, I probably did. I have met many people. I can't say.

Q. You don't recall our conversations—

A. I don't recall.

Q. —in May of last year?

A. I still don't recall it very well.

Q. Now, Mr. Donahue, I'm very interested in this first twenty four boxes that you counted. You found an approximate fourteen per cent shortage, didn't you?

A. Yes.

Q. And those were boxes that were selected out of the entire total of 257, an approximately ten per cent sample of the entire shipment, wasn't it?

A. Yes.

Q. And thereafter, either you know or understand that Mr. Borak insisted upon the entire shipment being counted?

A. Yes.

Q. And that brought it down to 2.92%, didn't it?

A. Yes.

Q. Made quite a substantial difference in the final outcome?

A. Yes.

Q. Now, sir, I was very interested to hear you say that on recounting those twenty four boxes, on which you had found a fourteen per cent shortage, that on a recount by your inspectors, that there was a one per cent change, there was only a thirteen per cent shortage on those boxes then?

A. Yes.

Q. Now, they lidn't grow in there, did they?

A. I don't think so.

Q. There must have been an error in counting?

A. Yes there was.

Q. There must have been. So—isn't it true, sir, that these bags are stacked very tightly together in a box?

A. Oh, yes.

Q. And you can—sometimes one or two stick together and you just don't get an accurate count the first time you go over them?

A. Possibly.

Q. That is probably what happened, isn't it?

A. Yes.

Q. And so when you came up to counting those same twenty four boxes again and you find that you made a one per cent shortage, as you stated, that would mean that there is a possibility of an error in your office to the extent of one per cent?

A. I think—yes,—

Q. Isn't that true?

A. I believe so.

Q. And so, sir, on counting the entire 257 boxes, you come up within a total of 2.92% and you make a one per cent error adverse to the party against whom the complaint was filed, then, in reality, you have a 1.92% error, isn't that right?

A. No, sir.

Q. It is possible?

A. Anything is possible, but not at all probable.

Q. It had already happened, hadn't it?

A. Yes, in this case.

Q. Yes. That is enough on that point. And to your knowledge, after this investigation, the proceeding was discontinued, was it not?

A. Yes.

Mr. Wagner:

No further questions.

Re-Direct Examination.

By Mr. Wagner:

Q. And to your knowledge, was it discontinued because it was reported that Vahlsing and Borak had settled their differences?

Mr. Abbott:

Now, Your Honor,—

The Court:

Now, that clearly invades the ruling of the Court.

Mr. Wagner:

I'm sorry, Your Honor.

The Court:
It involves hearsay.

Mr. Wagner:
Well, he just asked him the question right ahead of it. I was just following his question. He asked him if, to his knowledge, it had not been discontinued.

Mr. Abbott:
Yes, but not—

Mr. Wagner:
And then I said if it had been discontinued because of a settlement between Vahlsing and Borak, to his knowledge.

Mr. Abbott:
It would be hearsay as to him.

Mr. Wagner:
If he has knowledge of one, I don't know why he wouldn't as to the other.

The Court:
I will overrule—I mean I will sustain the objection.

Mr. Wagner:
Yes, sir.

Q. Now, about this one per cent error in the 2.92 business, it could conceivably have been only short 1.92, but if there was one per cent error, it could conceivably have been short 3.92?
A. Certainly.
Q. One per cent could go either way?

The Court:
I believe you can argue that to the jury.

Mr. Wagner:
That's all.

Mr. Abbott:
We have no questions, Your Honor.

The Court:
All right, you are excused, sir.

Mr. Wagner:
Call Mr. Tom Blackwell.

(Witness Blackwell entering Courtroom.)

Mr. Wagner:
Wait just a minute, Mr. Blackwell. Didn't you bring those inventory things down with you?

Mr. Blackwell:
I have them out there.

Mr. Wagner:
Well, go get them and send Simpson in here while you are getting those things.

The Court:
What witness do you want now?

Mr. Wagner:
Simpson.

The Court:
What witness?

Mr. Wagner:
Simpson, I think, Tom Simpson.

The Court:
All right, call Mr. Simpson in.

Mr. Abbott:
We could call Mr. Donahue for one more question while we are waiting for this witness.

The Court:
No, I am going to hear this witness.

TOM SIMPSON, having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Wagner:
Q. What is your name, sir?
A. Tom Simpson.
Q. Where do you live, Mr. Simpson?
A. Mathis, Texas.

Mr. Abbott:
Your Honor please, we object to any testimony from this witness because it would be a surprise to us. We filed a request for interrogatories addressed to the defendant to state the names of the witnesses he would rely upon, and this—according to our information, this witness is not on the list.

The Court:
I will overrule the objection. He did give his name here Monday morning when we selected the Jury.

Mr. Wagner:
When I gave them that list, I didn't know anything about—

The Court:
All right, I have already ruled.

Q. Did you say you live in Mathis?
A. Yes, sir.
Q. With what concern are you connected?
A. F. H. Vahlsing.
Q. What position do you have with that company?
A. I operate the gins and help with the packing shed.
Q. I am interested, Mr. Simpson, in the counting of boxes containing Roto-Lith, Limited, polyethylene bags, directing your attention to the subject in which I am interested, and I wll ask you if on some occasion during 1954 you had any occasion to count any of those Roto-Lith bags?
A. Yes, sir.

Mr. Abbott:
Your Honor, we would—regret to make these objections, but we would object to this testimony unless there is some showing that the bag was counted either in the presence of Roto-Lith or that there was a—

Mr. Wagner:
I agree and I am going to show it.

Mr. Abbott:
All right, sir.

Q. Who was present at that counting?
A. Mr. Vahlsing and Mr. Borak.
Q. I will hand you a slip of—what is that paper?
A. That is a teletype message.
Q. Teletype message?
A. Yes, sir.
Q. Is that from your Mathis plant?
A. Yes, sir, it is sent—
Q. Now, without reading what that message says, are there some messages on there from which you can establish the approximate date of this occasion?
A. Well, I suppose there would be, yes, sir.

Mr. Wagner:
Wait just a minute. Let me show it to counsel so he will know what you are looking at (passing instrument to Mr. Abbott).

The Court
Let's get at it this way; this would be the proper way.

Mr. Wagner:
All right.

The Court:
You say you were present with Mr. Vahlsing and Mr. Borak—

A. Yes, sir.

The Court:
—when some counting was done?

A. Yes, sir.

The Court:
Are you able to fix the approximate date when that was done?

A. It was sometime along toward the last of April.

The Court:
How do you know that date?

A. Well, I don't really know, we were just packing carrots then,—

The Court:
All right.
Q. —the approximate time when we were packing carrots.

The Court:
What year was that?

A. 1954.

The Court:
And what time do you usually pack carrots?

A. Well, we pack them from March on.

The Court:
How long?

A. Sometimes we go up 'til June.

The Court:
All right, it was during the carrot packing season of 1954.

A. Yes, sir.

The Court:
All right.

Mr. Wagner:
Thank you, Your Honor. And where did you get the Roto-Lith boxes that you were counting there?

A. They were on the shed there for our use.
Q. Did you see them arrive?
A. I don't believe I did, no, sir.
Q. Well, now, who was present at this counting?
A. Mr. Vahlsing, Mr. Borak and—well, a few peopel there. We had quite a few of them counting them.
Q. Well, now, which Mr. Vahlsing?
A. Mr. F. H. Senior.
Q. Senior. And approximately how many boxes were counted?
A. I couldn't—I don't remember. We counted enough to arrive at what we were trying to do, we thought. When we had enough, why, we quit.
Q. And was Mr. Borak present during that counting?
A. Yes, sir.

The Court:
What?

Mr. Wagner:
He said "Yes, sir."
A. Yes, sir.

The Court:
I didn't hear him. I saw him shake his head. I have to put it in the record.

A. Yes, sir, he was there.

The Court:
All right.

Q. And what did you gentlemen determine from that investigation that was made there in his presence?

A. Well, we determined the amount of bags that was marked on the outside of the box, there wasn't that amount on the inside.

Q. Approximately how many short would they run?

A. Well, they wouldn't—they didn't follow any definite pattern. They would run from fifty to maybe two hundred, maybe one or two of them have three or four hundred. We were paying our labor there by the—by piece work, and what we used was the count in those bags to pay them, and when we found out we had a light count there, why, that is the reason we got to counting them.

Q. You say you had a light count?

A. Yes, sir.

Q. What do you mean by light count?

A. Well, marked fifteen hundred on the side and we didn't have that many bags in there and we were paying those people to pack fifteen hundred bags. That was why I was connected with it.

Q. Was that why you undertook this count?

A. Well, they were short. Mr Vahlsing wanted me to help count them.

Mr. Wagner:
I think that's all.

Cross Examination.

By Mr. Abbott:

Q. Now, you stated that you didn't see the boxes unloaded off of the truck?

A. I don't believe I did, no, sir.

Q. And you don't know when the truck came in with the boxes?

A. No, sir, I don't. I couldn't say for sure.

Q. And you don't know how long they had been around there?

A. Well, they were all sealed, I know that.

Q. Surely, but you don't know how long they had been around there?

A. Well, they hadn't been there long because we were, I know, running out of boxes, bags pretty regularly there.

Q. But you don't really know of your own knowledge what happened to those boxes,—

A. No, sir.

Q. —other than you participated in the count?

A. Yes, sir. They arrived there, I know that, in the truck, and unloaded there.

Q. Yes, sir. You lost sight of them for a while?

A. Well,—

Q. Now, was Fred Meyer there at the time?

A. I didn't know him if he was.

Q. You didn't know him?

A. No, sir.

Q. Now, whose truck did they come in?

A. I don't know. I didn't—I didn't, as I say, remember seeing them come.

Q. You don't remember even seeing them come there?

A. No, sir.

Q. You don't know whether it was a Vahlsing truck or a common carrier, do you?

A. No, sir, I don't.

Q. You just don't know about that?

A. No, sir.

Q. And you don't know how many boxes were counted?

A. No, like I say, we just counted enough to establish that they were light.

Q. And you didn't count all the boxes yourself?

A. Later on, I did, I had—hired men to do it.

Q. You didn't do it yourself, though?

A. No, sir.

Q. So you don't know, yourself, actually what was in the boxes, all of them, do you, of your knowledge?

A. Not of my own particular knowledge, only the ones I counted personally.

Q. And you don't know how many that was?

A. It was under the amount marked on the side of the box.

Mr. Abbott:

All right, sir. Your Honor, I move to strike all of the testimony of this witness because it has not been shown a chain of possession of these boxes which would permit a check of this type.

The Court:

Well, I will overrule the objection. I believe your objection really goes to the weight of it and not to its admissiblity. Now, you say these boxes were sealed?

A. Yes, sir.

The Court:
With what? How were they sealed?

A. Seems to me they had adhesive.

The Court:
Sir?

A. Seems to me they had a paste or a glue.

The Court:
And you say you paid your packers for packing by the sack?

A. Yes, sir, by the bag.

The Court:
By the bag?

A. By each bag, yes, sir.

The Court:
Did you count the bags after a packer had packed a bag, was his pay figured on the number of bags that he had actually packed?

A. Well, no, we gave them the bags before they packed and counted them that way. After they were packed, they were all put in one common place. We had no—there was no count on them then. We gave them the empty bags and counted the empty bags.

The Court:
You did count out to them the empty bags before you gave them to them?
A. Yes, sir.

The Court:
All right.

Cross Examination (Continued):

By Mr. Abbott:
Q. You don't know how the boxes were sealed?
A. I believe adhesive. I don't remember.
Q. That's all you know about it, just some adhesive around them?
A. Seem to me—seems to me the top had adhesive on it.
Q. All right, sir. How long did you say you have been working for Mr. Vahlsing?
A. Little over four years.

Mr. Abbott:
All right, sir.

Mr. Wagner:
That's all. Ask Mr. Tom Blackwell to come in, if he has got his records. May this gentleman be excused, Your Honor?

The Court:
Yes.

TOM BLACKWELL, having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Wagner:

Q. What is your name, sir?

A. Tom Blackwell.

Mr. Abbott:

Your Honor, we make the same objection as to the interrogatories on this witness, he wasn't shown to be a witness in the case.

The Court:

Overruled.

Q. Where do you live, Mr. Blackwell?

A. Mercedes.

Q. By whom are you employed?

A. F. H. Vahlsing.

Q. In what capacity?

A. Bookkeeper.

Q. Is that in the Elsa office?

A. Yes, sir.

Q. That is where the main Vahlsing offices are here?

A. Yes, sir.

Q. How long have you been with that concern?

A. Since March of 1952.

Q. Are you the only bookkeeper or are there others?

A. There are others.

Q. You are the head one?

A. Yes.

Q. The books and records are kept under your supervision?

A. Yes, sir.

Q. Now, I want to direct your attention, Mr. Blackwell, to any shortages showing up in your inventory, particularly with reference to polyethylene bags. Did that occur?

A Yes, sir.

Q. About when?

A. First shortage that we had was a small shortage in the 1952-53 season.

Q. What was the amount of that shortage?

A. Ran $19.53.

Q. And during that season, who had Vahlsing been buying his bags from?

A. Principally Mill Print.

Q. All right, let me ask you this, the fiscal year of the Vahlsing corporation is from July 1 to July 1, isn't it?

A. Yes, sir.

Q. And so I suppose you close your books on June 30th of each year?

A. Yes, sir.

Q. And the 52-53 season, you had an inventory shortage of nineteen twenty seven in these bags, $19.27?

A. Yes, sir. I thought it was nineteen fifty three.

Q. All right.

Mr. Abbott:

Your Honor, I don't see the materiality of these questions addressed to their inventory shortage and what relation they have to the issue of this slander or even the truth of it and I don't see how there could be any connection between it.

The Court:

Well, I believe that is to the weight of it, counsel. I believe your objection is to the weight of it. If it doesn't have any materiality, the jury will recognize that fact, I think.

Q. Have you got your inventory data there for January, 1954?

A. Yes, sir.

Q. Would you open that, please, sir? Do you want to come back here, so you will understand this?

(Mr. Abbott approaching witness chair.)

Q. Now, on January 31st of 1954, was a physical inventory taken of not only polyethylene bags, but tomato crates and other stuff that you carry in your inventory?

A. Yes, sir.

Q. A physical inventory, is that right?

A. Yes, sir.

Q. Now, what do you call this, a recompilation or what?

A. Well, it is an analysis inventory.

Q. Inventory analysis?

A. Yes, sir.

Q. All right, to analyze your inventory situation, I think your first column, you take into consideration what your inventory was on December 31st, that is the beginning of January, do you not?

A. Yes, sir.

Q. Then do you add into that inventory—

A. Yes, sir, I add the purchase into it.

Q. The purchases during the month?

A. Yes, sir.

Q. Now, what purchases, those that you send out the orders on, or what kind of purchases?

A. Everything we buy from any concern in the way of packing supplies.

Q. As soon as you send a telegram ordering something, you add to your inventory?

A. We add it as soon as it is received.

Q. That's what I am getting at, you get a receiving ticket from the warehouse involved, do you not?

A. Yes, sir.

Q. And when you get that receiving ticket, you add it on your books to your inventory?

A. That's right.

Q. And you have got that much further to account for?

A. Yes, sir.

Q. Now, then,—

Mr. York:

Your Honor, we are going to object to counsel's leading the witness.

Mr. Wagner:

Well, all right, I will ask it in a different way.

The Court:

Well, let him tell how he does it.

Mr. Wagner:

All right.

Q. Do you take anything out of that gross figure, that is what you had at the beginning of the month and what came into your warehouse?

A. We take it out at the end of the month.

Q. No, before you get to the end of the month,—well, go ahead, at the end of the month, what do you do?

A. At the end of the month, why, we receive a report from the shipping office.

Q. All right.

A. That contains every container that was shipped during that season.

Q. That season?

A. I mean during that month, during the period.

Q. Yes.

A. And we take that off of inventory at that time. It is only taken off at the end of the month, and anything that we might sell to some other shipper, we take that off at the time it is sold, anything that we would transfer to Mathis or Laredo, any other branch, is taken off at the time we move it out of our inventory.

Q. And then, by doing that, that is taking your beginning inventory and the stuff that comes in, and you take off the stuff that goes out, what do you do with the net figure?

A. Well, a beginning physical, with the various changes in the flow of inventory, will come to a book figure that we are supposed to have. Then we have one man that is responsible for taking the physical. We take the physical and enter it beside the book and see how close they check, and we have two columns in here, which show the over and under.

Q. All right. Now, on your January 31st inventory analysis, what did you find with reference to your polyethylene bag inventory?

A. We were short.

Q. How much?

A. Well, I couldn't tell you the exact number of bags.

Q. No, I mean in dollars. Your figures are in dollars, aren't they?

A. These are in dollars. It was four hundred and some odd dollars short.

Q. What had been your experience in your inventory analysis up to that January 31st analysis with reference to your polyethylene bags?

A. Well, in normal operations, our shortage will run maybe $70.00 a month, if we are shipping every day, and if we are shipping heavy, day and night, why, it could run higher, sometimes as high as maybe a hundred and twenty five.

Q. That is just ordinary loss in packaging?

A. That is stuff that I can't account for. I don't know where it went.

Q. Was this inventory shortage of four hundred and some odd dollars in January, was that the first serious one that you had run across?

A. That season, yes, sir.

Q. Now, how about your February, 1954, inventory analysis, what did you—you can refer to your—those are your original records that you have with you, are they not?

A. It is the carbon copy of it. The original copy is sent in to New York each month.

Q. And whose handwriting is that, who makes that up?

A. Well, everything from the beginning inventory on is in my handwriting.

Q. All right, what did you find on your inventory analysis at the end of February, 1954?

A. We were short again.

Q. How much?

A. I believe the figure jumped—now, this was a cumulative figure.

Q. Yes.

A. We are supposed to adjust our inventory at the end of each month, whatever our inventory shortage is, but at the end of January, well, $400.00 was out of line, so I wrote to New York and told them that I was not adjusting it, that I figured we had a mistake, possibly in our physical inventory, and possibly it would adjust itself at the end of February.

Q. Uh huh.

A. Well, it didn't.

Q. What did you find at the end of February on your inventory analysis?

A. It jumped to something around $4,000.00. We were shipping poly bags very heavily at that time.

Q. Well, then, did you adjust that four thousand inventory shortage or did you let it accumulate?

A. I let it accumulate.

Q. And what did you find on your inventory analysis at the end of March?

A. It went up again.

Q. To approximately what figure?

A. Well, I believe it was up to six, but I am not absolutely sure.

Q. Well, look. You have got it there, haven't you?

A. Well, I would have to add them up, to tell you. It would be close to six.

Q. And at the end of your fiscal year, which would have been the end of June, 1954, what was the status of your inventory with reference to short and over?

A. The total figure that I was short was slightly over $6,000.00.

Q. That is at the end of June?

A. Yes, but only $5,700.00 of that was polyethylene bags.

Q. Did you then write it off?

A. Yes, sir.

Q. And went into '55, then, with that inventory shortage written off?

A. Yes, sir.

Q. In other words, you started your '55 with your actual physical inventory?

A. That's right.

Mr. Wagner:

I think that's all, Your Honor.

The Court:

All right, cross examine.

Cross Examination.

By Mr. Abbott:

Q. Mr. Blackwell, who all were you buying polyethylene bags from at that time?

A. Which season?

Q. In the '54 season. Isn't that the one you have just related?

A. It is 54-5, yes, that's the way we refer to it.

Q. Your cut-off date is June, 1954, for that fiscal year?

A. Right.

Q. Now, during that time, which would pre-date back to July, 1953, through 1954, who were you buying bags from?

A. Our season starts on July 1st. Actually we don't start any operations until along in October, so our season runs 54-55, that is the season we had the big shortage in.

Q. Well, now, you wrote this off in June of '54?
A. Yes, sir, I had a write-off then.
Q. And yet it was in the 54-55 season?
A. I have a write-off every year, see. The first shortage appeared on the 52-53 season.
Q. Yes.
A. And 53-54, which would be along the end of June, I had a write-off then.
Q. How much?
A. That particular year was about—over $8,000.00.
Q. That is what you have just testified to, isn't it?
A. Yes, sir.
Q. And $5,700.00 of that was in polyethylene bags—
A. Yes, sir.
Q. —according to your figures?
A. Yes, sir.
Q. Now, that is the time I am talking about.
A. All right.
Q. Who were you buying bags from?
A. We bought from a number of suppliers. About half of the bags that we bought came from Roto-Lith.
Q. But you did buy from a number of suppliers, didn't you?
A. Yes, sir.
Q. And as a matter of fact, you have made claims against all of these suppliers for shortage, haven't you?
A. No, sir.
Q. Well, has Mr. Vahlsing?
A. Not to my knowledge.
Q. Just Roto-Lith?
A. That's the only one I know of.
Q. You don't know of any others?
A. No, sir.

Q. Now, what was your total dollar volume of business that you did with Roto-Lith in that period?

A. Well, ours was about $88,000.00, that is for the Elsa branch alone.

Q. Don't you have the books there?

A. Not everything, no, sir. I don't have any ledger here.

Q. You don't have the ledger there?

A. No, sir.

Q. You don't know, then, exactly what you did buy?

A. I know that we bought slightly over nine million bags from him and the value of those things was $88,000.00 and a few cents, something like that.

Q. And what was your total volume from all of your suppliers at that plant? It must have been somewhere around $176,000.00, if you bought fifty per cent—

A. Well, roughly double that. I have the figures in here, if you would like to hear them.

Q. I would like to know.

A. During that year, we bought 9,121,625 bags from Roto-Lith; total value was $88,534.71. From other suppliers, we bought 9,000,000, 9,618,559 bags; the value of that was $106,689.07.

Q. This is all polyethylene business?

A. Yes, sir.

Q. Well, that is about $194,000.00 worth—

A. Yes, sir.

Q. —of polyethylene business, isn't it, $195,000.00?

A. Yes, sir.

Q. And half of it from other suppliers?

A. Yes, sir.

Mr. Abbott:

Excuse me just a moment, Your Honor.

Q. Now, Mr. Blackwell, during that season, things were pretty brisk, down at Mathis, weren't they, and Elsa, a lot of business, wasn't there?

A. I don't know just how much business Mathis was doing, but we were pretty busy.

Q. You were in constant need of bags, urgently, weren't you?

A. Well, most of the time, we needed them.

Q. And you were after your suppliers to make every effort to get them there so you would have them, so you could—

A. I wasn't asking for it. The bags were ordered by New York.

Q. Yes, sir.

A. I simply received them and then made disposition of them.

Q. You know that that was going on, though, don't you?

A. I know that they needed bags, yes, sir.

Q. Badly?

A. Well, I don't know how bad they needed them. We never did run out.

Q. You didn't reach the end, where you had none at all, you still had bags coming in all the time?

A. Yes, sir.

Q. Now, how long have you known Mr. Fred Meyer, the defendant?

A. Since he came down here to start operating Texas Plastics. I met him within a few days after he came here.

Q. And when was that?

A. About two years ago.

Q. Well, when, in February, March, two years ago, April, just when?

A. It was some time after the first of the year, I would say. I couldn't tell you what month. I really don't know.

Q. Do you work with him?

A. Not very much. See, when this Texas Plastics was originally organized, why, books for Texas Plastics were kept in my office. Since that time, why, they have their own set-up, and while we are in the same building, they are roughly a block away from me.

Q. You are not employed by Texas Plastics?

A. No, sir.

Q. You are not an employee of Fred Meyer?

A. No, sir.

Q. Have you ever talked with him about bags?

A. Yes, sir.

Q. What did he say to you about bags?

A. He has explained the set-up of—

Mr. Wagner:

Your Honor, I am going to object to all this. We will be here all week. What is the materiality of it? I object to it as being immaterial and irrelevant, time consuming, no reference to any issue in this case.

The Court:

Overrule the objection.

Q. Has he demonstrated to you how bags can be short counted and bidding on inside instead of outside simensions?

A. No, sir.

Q. Never talked to you about that at any time?

A. No, sir, he has shown me through his plant and

told me roughly how it operates, but I don't think I would be very good at explaining to you how it does operate.

Q. Did he ever tell you anything about any other bag manufacturers?

A. Well, he and I have worked on this Roto-Lith some, trying to—weighing bags and weighing boxes.

Q. Is it your idea that if you weigh the boxes, that you can determine what the count is?

A. He has a chart worked out, which I have, that gives the various dimensions of film and the various thicknesses and approximately how many bags you should have out of that, in case you start to manufacture out of it. I have one of those charts. Not with me, but I have one.

Q. Did he tell you why he gave you that chart?

A. No, there is a stack of them about that high in the supply room. I think anybody that wants one can have it.

Q. He is an engineer and he constructed it himself?

A. I don't know who constructed it. I know I have them in the supply room.

Q. Have they been disseminated around to various places?

A. Well, I don't know what—

Q. To your knowledge?

A. Not to my knowledge, but they could have been.

Mr. Abbott:

All right. All right, we have no further questions, sir.

Re-Direct Examination.

By Mr. Wagner:

Q. One thing, Mr. Blackwell, at one point, I think you said that your bag shortage was in the 1954-55 season; was that correct?

A. Well, we had a shortage that year. The biggest shortage we had on our bags was in the 53-54 season.

Q. I thought that was it.

A. Yes, sir. We had a shortage the next year—

Q. Well, since they have gone into that with you, I suppose we might as well clear it up.

Mr. Abbott:

I don't recall going into it, Your Honor.

Mr. Wagner:

Well, I do recall that the witness said that his bag shortage was in the 54-55 season and I was reasonably sure he didn't mean that and that's why I came back to it.

The Court:

All right, overrule the objection.

Q. Since we have got the 54-55 in here now, let's see your closing—get your inventory analysis for the close of the 1954-55 season.

Mr. Abbott:

Your Honor, it appears to me that we are going into something that is extraneous to this suit, it would be piling a presumption upon a presumption, if this comes in. We are interested in the 53-54 season, which counsel interrogated him about, and I have no refer-

ence to anything, or any interest in anything subsequent to that, and I would like to renew my objection.

The Court:
I will overrule the objection.

Q. All right, you say you had a shortage in polyethylene bags in the 54-55 season?
A. Yes, sir.
Q. What did it amount to?
A. Dollars and cents?
Q. Yes.
A. It amounted to $2,566.02.
Q. What was the biggest item in that shortage?
A. We had a rather large loss in poly corn bags.
Q. Approximately what amount?
A. I believe it was around eighteen hundred, but let me look.
Q. All right.
A. That's right, $1,848.42.
Q. Now, you can't tell, from that record, however, who supplied those corn bags, can you?
A. We never bought corn bags from anybody except Roto-Lith.
Q. And $1,800.00, an inventory shortage, showed up in those corn bags in the year 54-55?
A. Yes, sir.

Mr. Wagner:
That's all.

Mr. Abbott:
We have no questions, Your Honor.

Mr. Wagner:

No further questions. Call Mr. F. H. Vahlsing, Senior.

FREDERICK VAHLSING, SR., having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Wagner:

Q. What is your name, sir?

A. Frederick Vahlsing.

Q. There are two Frederick Vahlsings, are there not?

A. This is Senior.

Q. This is Senior. Mr. Vahlsing, I want to direct your attention to when you first started doing business with Roto-Lith, Limited. Do you recall more or less when that was?

A. Why, as near as I can recollect, it was when we went into the packaging of poly carrots. I think it was the latter part of 1952 or early part of 1953.

Q. Aren't you a year off? Isn't it the latter part of '53 or early '54?

A. Well, I might be a year off on that because we started packing poly bags somewhere around '51 or '52 and I don't know, just exactly recollect the year that we did business with Roto-Lith, it may be '52 or it might be '53.

Q. Well, I still want to ask you with reference to a conversation—whether you had a conversation with Mr. Borak with reference to his putting on a third shift.

A. No, I don't recollect anything like that.

Mr. Abbott:
Your Honor, I object to the leading of this witness.

Mr. Wagner:
I am not putting any words in his mouth.

The Court:
All right, don't lead him.

Mr. Wagner:
I am just directing his attention to it.

The Court:
I am not saying you have, just don't lead him.

Q. And I want to ask you whether you ever had a conv—no, I withdraw that question. Tell us what your conversations were with Mr. Borak when you first started doing business with him?

A. Why, in reference to what?

Q. Well, in reference to your urgent need for bags, if you had any urgent need for bags, and whether you asked him to do anything particularly about getting delivery to you.

A. Not, not any more—not any more than I would any other suppliers, not any more than other of our suppliers. We always had enough bags on hand that we never ran too short that there was an urgency of delivery down here. We just kept plenty of bags on hand most of the time. Of course, sometimes we might have run a little bit closer than we thought and we might have said—we might have said that—well, we want certain day delivery on—certain day delivery on them. That is as far as we usually went in our conversation with Mr. Borak.

Q. Did you ever have a conversation with him with reference to accepting less than the full amount of bags that he was supposed to ship?

A. What's that again?

Q. Well, I don't know how to put the question without being too leading about it. Was there any—state whether or not you ever had any discussion with Mr. Borak about accepting ninety eight per cent of the bags supposed to be delivered as a good and satisfactory delivery?

A. Ninety eight per cent and pay for a hundred?

Q. Yes, sir.

A. I buy millions of bags all over the country from all kinds of suppliers. I never made a contract like that in my life. If I pay for a hundred—if I pay for a hundred—

Mr. York:

We object to the answer as unresponsive, if the Court please.

The Court:

Yes, I sustain the objection. Don't consider his answer, lady and gentlemen.

Q. Let me ask you another thing, Mr. Vahlsing, did you ever have occasion to be in Mathis when Mr. Borak's bags were physically counted when he was there too?

A. I did.

Q. When was that?

A. Well, as near as I recollect that, that was some time in the latter part of April.

Q. Of what year?

A. Latter part of April of 1954, I guess, latter part of April.

Q. Had there already been some discussion about shortages in your organization?

A. Right, there had been. There had been.

Q. The witness who testified just before you has testified to inventory shortages down in Edinburg. Was that brought to your attention?

A. Yes, sir.

Q. On the occasion of this Mathis matter, where did you meet Mr. Borak?

A. Mr. Borak visited me at Corpus Christi, as I recollect it, at the Driscoll Hotel. I make my headquarters, at acertain times of the year, at the Driscall Hotel at Corpus Christi, and Mr. Borak come in there and I believe at night time, I don't know if I met him that night or the next morning, but we had breakfast together and Mr. Borak and I drove out in my car to Mathis. I wanted to show him our carrot operations at Mathis, where we pack carrots, and we discussed the shortage of bags. Everything was very nice and very friendly and we got into—

Q. Was there already some question about whether maybe his boxes were short?

A. Oh, yes, yes, that was part of the discussion, see. So we got up to Mathis and we looked over our ranch up there. We have a seven thousand—six thousand some odd acre ranch up there, we grow cotton and vegetables.

Mr. York:

If it please the Court, that has nothing to do with the present—

A. All right. I took Mr. Borak out on the farm—

The Court:
I don't know—just wait a minute.

A. All right.

The Court:
I don't know that it hurts or helps either side. Let's get along.

A. We took Mr. Borak out, Judge, and showed him our farm and then—we have a big packing shed there and we drove on the packing shed, we have a three hundred by a hundred and twenty feet concrete steel packing shed there. We drove on the packing shed and we had several of our men there, I just don't know why they happened to be there, but they just happened to be there, but we were packing potatoes there at the same time, we grew some potatoes that year up there, and the further discussion came up about the shortage that way, and then I took Mr. Borak back to Cuddihy Airport and I fly my own plane and I believe that same day, I flew him down to McAllen. We were very nice. Everything was nice and friendly, and the next day we took him over to our Elsa warehouse where we were packing carrots at that time and Mr. Burns showed him where we were short on these carrots. Well, the next thing, at that time, we owed him about fifteen to twenty thousand dollars, I didn't know how much actually we owed him, and I told him that we were not going to pay that bill 'til he made some of the shortage good, so I was down here in Texas and I wired the New York office not to pay his bills 'til he made some shortage. Well, the next thing that happened, the next thing that happened, I went back to New York

and Mr. Borak called us up one day and he said he needs money very badly. I say "We will give you ten thousand dollars on account," as I recollect it, "But we want to make good this shortage here; we should get at least five thousand dollars," I think we bought a hundred and some odd thousand dollars of bags off of him—"And we should take at least five thousand dollars off of your bill to make part good the shortages that we had," so we took that up and one day Mr. Borak come in the office and I was just going out of our New York offices, and I says "Now you want to get paid," and I think he had another lawyer with him, I says, "I think you want to get paid; you go and see Junior; we want to settle up this in a nice way, we don't want to have no quarrels or arguments, we want to pay and get it done, but I think we are liable to five thousand dollars. You go ahead and see Junior." And I already told Junior to settle with the gentleman. Well, I didn't hear nothing about the case, but a week later, or two weeks later, whenever it was, we were served with a summons for suit for a million dollars. We apparently slandered Mr. Borak in our office, or somebody did. Now, I don't know who did it, but we were served with a suit for a million dollars. Well, I had to retain attorneys again, I had to retain—

Mr. Abbott:
Your Honor, this is—

A. Well, I had to—

The Court:
Just wait a minute now. When an objection is made, you just wait.

Mr. Abbott:
It has gone so far, I have forgotten what the original question was now, Your Honor.

The Court:
I have too.

Mr. York:
"Where did you meet Mr. Borak?"

The Court:
Now, then, take it up and ask your question there.

Mr. Wagner:
Yes, sir.

The Court:
It is immaterial about him retaining attorneys. Go ahead. Take it up from there, counsel.

Q. Now, in this New York petition that he filed against you, he says that you said this about him, "You stole money from us and you are a thief and a crook." Did you—

A. I have never talked to Mr. Borak in that language, never in my life. In fact, I only met him for about two or three minutes in the office while I was walking out. He came in and waited in the lobby in our office. I never talked to him even.

Q. That's all right. That's enough on that point. Now, Mr. Borak testified here this morning, Mr. Vahlsing, that at some time, I don't know that I have a note here, but that you told him that you had found out that Fred Meyer had said these—called him a crook and things like that, and that—oh, here it is—

that after he filed this suit against you—and it is not against you personally, but you are one of the major owners of Texas Plastics, Incorporated, are you not?

A. I am the owner.

Q. Okay.—that you told him that unless he withdrew that suit, that you would break him and his company?

A. Who? I did?

Q. That's what he says you said to him.

A. That's a lie, unequivocable lie.

The Court:

This suit, wasn't it, he was talking about? This suit?

Mr. Wagner:

This suit, yes, sir.

The Court:

You said "that suit."

Mr. Wagner:

Yes, sir. Excuse me.

The Court:

This suit.

Q. His testimony was that about the middle of March, after this suit was filed against Texas Plastics, that you called him and said, "You better withdraw that suit,—"

Mr. Abbott:

Your Honor,—

Mr. Wagner:
What—

Mr. Abbott:
All right, go ahead.

Q. That you better withdraw that suit in Texas, "or I will break you and your company."
A. That's a lie.
Q. And that you said further, "You haven't got a chance in Texas, why, your lawyers are my lawyers." Did you make a statement like that to him?
A. Don't recollect it. Don't think so.
Q. You might have said something about the lawyers being the same?

Mr. York:
If the Court please, we object to leading.

The Court:
I sustain the objection.

Mr. Wagner:
Withdraw the question.

Q. That you—that on another occasion, you told him you had found that it was true that Mr. Meyer had called him a thief and a crook and that you now wanted to print a retraction of it.
A. That's a lie.
Q. And that just a week ago, Monday a week ago, you called him from Corpus Christi and offered to do the same thing.
A. He called me.

Q. You weren't in on the final settlement with Borak in New York, were you? Didn't—

A. No.

Q. Didn't Junior handle that?

A. No, I didn't handle that. I don't know anything about it at all.

Mr. Wagner:

All right, that's all. Just a minute.

Mr. Abbott:

Does Your Honor wish to go forward at this time or could we—

The Court:

Let's go forward a little longer, see if we can't—I could recess now 'til one thirty, I suppose.

Mr. Abbott:

I would appreciate it.

The Court:

All right, we will recess at this time until one thirty, and you will not discuss the case in the meantime, don't let anybody discuss it in your presence. The jury may retire quietly. Court will remain in session until the jury has retired.

(Whereupon the jury left the Courtroom, after which the following proceedings were had outside the presence of the jury.)

Mr. Wagner:

Your Honor, I wanted to ask a question of the Court, when the jury gets out.

The Court:
All right.

Mr. Wagner:
It is nothing particularly damaging if they do hear it. I just wanted to ask with reference to this rule, can the officers of the company—I don't want to violate the rule; I have insisted on these people keeping apart. Would it be a violation of the rule if I speak to both of these men together at lunch?

The Court:
Yes, I would rather you didn't talk to them together.

Mr. Wagner:
All right.

The Court:
All right.

(Whereupon, at 12:15 p.m., May 23, 1956, Court was recessed until 1:30 p.m. of the same day.)

Afternoon Session—May 23, 1956.

FREDERICK H. VAHLSING, SR., continued his testimony as follows:

Cross Examination.

By Mr. Abbott:
Q. Now you are the same gentleman that was testifying before we took the noon recess,—
A. I believe so.

Q. —for the record. Mr. Vahlsing, where do you live?

A. South Orange, New Jersey.

Q. And where are the principal offices of the various enterprises that you own or have the controlling interest in?

A. Well, all over the U.S.A.

Q. But do you maintain the general office in New York City?

A. General office is in New York.

Q. Do you refer to yourself as a Texan or a New York City person or how?

A. No, I am a resident of New York City. That is I am domiciled there—I mean—pardon me. That's a mistake. My business is located in New York City, that is our general headquarters, but our—my—where I am officialy domiciled, where I vote, that is in the state of New Jersey, South Orange, New Jersey.

Q. How many different corporations are you involved in?

A. Oh, it is hard to think. I got twenty odd, or more, and about forty sub-divisions of them.

Q. And about forty sub-divisions of those?

A. Roughly. Now I am just guessing. I don't keep track of it.

Q. They operate all over the United States?

A. Uh huh.

Q. And you have operated in the Rio Grande Valley extensively for many years, have you?

A. Yes, since 1920.

Q. How many employees do you have in this area?

A. Well, that varies. That varies. We employ as high as a hundred and fifty to two hundred on the packing sheds, farm laborers,—farm laborers, we operate—oh, altogether, in Texas, I don't know, it is

hard to say, runs up into thousands when we include field labor. We operate about 10,000 acres in various crops and we own 10,000 acres of land right here in the Valley and—

Q. Now, you follow the sun more or less, you pack in areas in the United States where—

A. I don't follow the sun, I am there all time. No, I don't follow the sun.

Q. Well, but you, at different times of the year, you are packing and operating in different areas?

A. Oh, we operate—not in different areas. We operate in—the places we operate, we are there the year around, we do something all year round. For instance, up in Maine, we are planting potatoes now, and we just got through shipping them, so it is an all year round operaion. In California, we grow cotton and we grow potatoes and we—it is an all year round operation. We don't follow the sun like run from one place to another, we stay there, we stay put, and I have been in the Rio Grande Valley since 1920. I developed a lot of these things we see in the Rio Grande Valley.

Q. You are responsible for much of the development down here?

A. Right.

Q. Now, Mr. Vahlsing, you went into the use of the polyethylene bags, you say, around 1951, thereabout?

A. Well, if I were to give you the whole history of the poly bag business,—

Q. I don't care for the whole history, sir.

A. All right, I will answer your questions.

Q. Please. Isn't that about when you went into it?

A. That is, now, what do you mean, by packing them or—

Q. By using polyethylene to pack your carrots and all in.

A. I think we went in around 1950, in a small way.

Q. In a small way, and larger thereafter?

A. And larger, and continued growing.

Q. And who did you buy your bags from at that time?

A. Why it is hard for me to recollect who I bought the bags all from. In 1950, there was very few people knew how to make bags.

Q. Then you would know just about who it was, wouldn't you, if very few people knew how to make them? Wasn't it Shalimar and Mill Print and people like that?

A. Oh, yes, but they were just beginners. Everybody began the bag business starting somewheres around 1950 because polyethylene was not released for manufacture 'til about 1947 or '48 and then in very, very small quantities.

Q. And it was only the larger manufacturers that had it?

A. No, no. Now don't get it confused. There was no such thing as larger manufacturers. There was no such thing. The first poly—if you will let me have five minutes, I will explain.

Q. No, no, I don't care to go into all of that.

A. All right.

Q. I just want to find ouf if you didn't buy a substantial quantity of bags during your operation from Mill Print and Shalimar and people of that category.

Q. Yes, we did, we did buy off various—we bought some of Shalimar and we bought some of Mill Print and then probably two or three others, a half a dozen others.

Q. And then in '53 and '54, you—maybe in '52 and '53, you bought from some smaller converters, didn't you?

A. Yes, we did.

Q. What was the reason that you shifted from Shalimar and Mill Print?

A. What was the reason? Well, it is just a question of price.

Q. You had problems with them, didn't you?

A. Oh, no, no, no, no, no, no, we had no problems, no. No, we had no problems. Shalimar, they had various prices and they had fixed prices, some of these smaller converters, they had a little cheaper prices, and we thought we would try those, get a little cheaper prices. We always do that, not because of this poly bag business, we give the little feller a chance, just as well as the big feller. The little fellow makes a better product than the big fellow, we love to give him a chance.

Q. I see. You like to help them out?

A. No, it isn't a question of helping them out either. It isn't a question of helping them out either.

Q. All right, didn't you have trouble with Shalimar and Mill Print?

A. No, absolutely not, none whatsoever.

Q. And didn't they refuse, after 1953, to sell you any more bags?

A. To sell me bags?

Q. Yes.

A. Well, I don't know.

Q. All right, sir.

A. I can order a million bags right now.

Q. All right, sir. Now, in 1953, you did contact—or Roto-Lith contacted you with regard to making bags from polyethylene?

A. Yes, I believe so.

Q. And at that time you had rather substantial requirements, didn't you?

A. Yes. Well, call it what you may, we started—our poly bag business has grown in leaps and bounds, tremendously.

Q. All right, so you had substantial requirements and you were getting various manufacturers, the converters, rather, to produce for you?

A. That's correct.

Q. And Roto-Lith was one?

A. Yes, that's correct.

Q. And you had probably six, seven or eight others, didn't you,—

A. Well,—

Q. —of the smaller converters that were supplying your bags?

A. Probably so. Probably so.

Q. You didn't limit your purchases only from Roto-Lith?

A. No.

Q. Now, in 1953, you had ordered from various people, from various converters, you had a good volume, you say, working, or fairly good volume; there was an urgency about the production of the bags at various time of the year, and particularly in December and January, wasn't there?

A. Not to my knowledge.

Q. Not to your knowledge?

A. No, no, we never run short of bags, we always had plenty of bags. If one converter couldn't make them, another one could.

Q. I would like for you to limit your answer to my question. Did you or did you not have an urgency and shortage in November and December, where you had to expedite the various manufacturers?

A. Absolutely not.

Q. You did not?

A. I did not.

Q. Isn't it true that you had started doing business with Roto-Lith on around the 1st of December, 1952, and that you implored them to put on an extra shift to turn out the volume of bags that you needed for these multiple number of industries that you had across the United States?

A. No, wait a minute, wait a minute.

Q. Now, just answer the question.

A. No. Absolutely not. You said a multiple of industries, my dear man.

Q. All right.

A. Now, we only used these bags down in this part of the country at that time.

Q. Now, sir, do you know Mr. Ben Young?

A. Who?

Q. Ben Young, Y-o-u-n-g.

A. Can't recollect him.

Q. With Common Envelope Company.

A. No.

Q. You have done business with him, haven't you?

A. Yes, but not me.

Q. Sir?

A. I don't know him.

Q. You don't know him?

A. No.

Q. You don't know that you were after Ben Young for rush deliveries all through that season?

A. I was?

Q. At your firm.

A. No.

Q. You don't know that?

A. Absolutely not.

Q. And at the end of the 1954 season, that you made a complaint about the bags and asked for a refund or rather a discount from the money you owed them at the end of the season?

A. Who was that?

Q. Common Envelope Company.

A. Common Envelope Company?

Q. Yes, sir.

A. I don't know anything about it.

Q. Know nothing about it?

A. Not me.

Q. Anybody present in the Courtroom that would?

A. What's that?

Q. Is there anybody present in the Courtroom on the side of the defendant that would know about it?

A. Well, I don't know. I don't know anything about that. You are asking me questionn I don't—in the first place, I don't know Ben Young and in the next place, I know the Common Envelope Company, that we probably did some business with. I had no business individually, myself, with him.

Q. All right, sir. Do you know Alan Spiegel, with the Clear Print Company in New York City?

A. No.

Q. Don't know him at all? Have you done business with him?

A. I don't know. We did Clear Print. Now, I don't buy all these bags here. I am not the—I don't know Alan Spiegel. I might have talked to him but I don't recollect him.

Q. And you don't recall telling Alan Spiegel that he and Harry Borak were your prime suppliers and that you were constantly on them for rush deliveries during this period?

A. Absolutely not. I told that to Spiegel?

Q. That's right.

A. No, I had no such animal.

Q. And then, in February, you canceled all the orders overnight that you had placed with him for February, March, April, May and June?

A. With who?

Q. With Alan Spiegel. Now do you say that you didn't do that,—

A. Absolutely not,—

Q. —in your office?

A. —I don't know the man. I don't know the man.

Q. Well, did your office do it?

A. I don't know. I don't know the man.

Q. And you don't know whether you also had to—made a complaint against them and wanted to have a discount off the bill you owed them at that time?

A. No, I don't recollect that, don't know anything about it.

Q. You wouldn't say that that didn't happen, though, would you?

A. Well, as far as my knowledge, I would say it didn't happen. It could have happened, but as far as my knowledge is concerned.

Q. That's right. You wouldn't say, though, that it didn't happen?

A. No, I wouldn't say that.

Q. Uh huh.

A. My knowledge—

Q. Well, now, Roto-Lith is the only company that you had trouble with, according to your understanding?

A. Yes, I think—yes, that's right. The only company that we had—we might have had some trouble due to bad manufacture, but Roto-Lith was the only company that short-counted us.

Q. I see. That is the only one?
A. I'll vouch for that. I know that to be a fact.
Q. I will ask—please mark this.

(Whereupon Plaintiff's Exhibit No. 6 was marked for identification.)

Q. I show you what has been marked for identification as Plaintiff's Exhibit No. 6 and ask you if you recognize that letter and ever received a copy of it?

A. I recognize the letterhead. I don't know who wrote the letter. I will take a look. Who is that? Whose signature is that, "F.J."? Who is this? What is this name on the bottom here?

Q. Do you want me to tell you?
A. I can't tell.
Q. F. J. Meyer.

A. Oh, F. J. Meyer. I see. It is blurred there, I couldn't tell, see. Well, as far as F. J. Meyer is concerned, at that particular time, Mr. Meyer had just come with our organization and I am not familiar who shortcounted Mr. Meyer. Mr. Meyer never counted any of these bags here.

Q. I will ask you for the explanation or at least your counsel will in a moment.

A. All right.

Q. Now, you say that he had just come with your organization?

A. At that particular time.
Q. At that time.
A. Well, a little before that.
Q. Well, how much before?

A. I think probably—well, he can better answer that question, when he come with our organization; I just don't recollect.

Q. Well, the date of this letter is July 25, 1954, is it not?

A. Well, he come there about six months before that, was it, '53, was it?

Mr. Wagner:
No, no, don't—

A. I can't pin-point it down when he come, but I know it was about six or seven months or maybe a year before that.

Mr. Wagner:
Do you offer it?

Mr. Abbott:
I will.

Mr. Wagner:
I haven't read it, but I have no objection to it.

Mr. Abbott:
May I read it to the jury, Your Honor?

The Court:
Yes, sir.

The Reporter:
What is the number of it?

Mr. Abbott:
It is P-6. (Reading Plaintiff's Exhibit No. 6 to the jury.)

Q. Do you recall receiving a copy of that letter?

A. No, I do not. I don't read but very few of the letters.

Q. You don't write very many, either, do you?

A. I don't write very many either, is right.

Q. Now, if a letter came addressed to you, setting out a business understanding, would you or would you not read it?

A. Oh, yes.

Q. You would?

A. Yes.

Q. All right, sir. I would like to show you what has already been introduced in evidence as Plaintiff's Exhibit 2, and I want to direct your attention to the next to the last paragraph there and tell me if you have read it before.

A. You want me to read this last paragraph here?

Q. Yes, you can read it all, to yourself.

A. Well,—

Q. Do you recall receiving the letter?

A. No, no, no, I don't.

Q. But that does express—

A. I get thousands of—hundreds of letters, and I couldn't recall this letter. Now this is probably addressed to "gentlemen" and it just doesn't come to me, it is addressed to F. H. Vahlsing, Incorporated, and that is correspondence that Mr. Fred Meyer had and there is no way of me acknowledging that I read this letter, to you.

Q. Well, it has been admitted into evidence that this letter was addressed to you.

A. Yes, that's right.

Q. And you have stated to me that you read business letters—

A. Oh, I read business letters, sure.

Q. —that have a business understanding expressed in them?

A. Yes, sure, but I don't read all of these letters here that are addressed to my company in New York, I wouldn't have time for nothing else.

Q. And this one does state that "Based on our understanding that 98% would constitute a good and acceptable delivery,—"

A. That might—

Q. Doesn't it state that?

A. That might be so, but not in my book.

Q. I am asking you, sir, about this letter; doesn't it state that?

A. I guess it does. I didn't read the letter fully.

Q. Let me read it again.

A. I didn't read the letter fully. I just glanced over it. Where does it say that? That's what Roto-Lith says. "Therefore we accept your complaint of $192.00 covering these invoices and based on our understanding that 98% would constitute a good and acceptable delivery, enclosed please find a credit in the amount of $80.44. The carrot credit is based on 1.76 and the corn credit is based on three fourths of one per cent. May we now look forward to receiving a check covering this delivery?"

Q. What was that last sentence there that you just read?

A. "May we now look forward to receiving a check covering this delivery?"

Q. "May we now look forward to receiving—"

A. "—a check for this delivery." But that letter, when he writes me that letter, that was his understanding, that doesn't mean that that was my understanding, that I accept 98%, because I bought millions

of bags from suppliers and nobody is going to sell me—

Q. Your counsel will have an opportunity to go into that with you, sir.

A. All right.

Q. Now, you didn't deny this in any letter that you wrote to Mr. Borak, did you?

A. I didn't write him any letters that I can—that is—

Q. I asked you if you denied it.

A. I deny that—I deny that I agreed to take 98% as a hundred per cent delivery,—

Q. I asked you the question, sir,—

A. —that's what I deny.

Q. —if you denied this statement in this letter in a letter to Mr. Borak?

A. I deny that statement in that letter because that is Mr. Borak's letter writing to me, he says he has got an understanding and I had no such understanding, to take 98%.

Q. All right, I don't want to argue with you, Mr. Vahlsing. I merely asked you, did you write a letter denying it?

A. No, no, I didn't.

Q. All right, sir. Thank you.

A. Don't get me confused, now. Because how could I deny a letter—

The Court:

You don't need to argue the case.

A. Well, I mean I couldn't deny—

The Court:

I say, don't argue the case, now,—

A. All right.

The Court:

—you answer questions, hereafter.

A. All right. I'm sorry.

Q. Now, Mr. Vahlsing, during the time that Mr. Borak was supplying bags for you, there came a time that you employed Fred Meyer?

A. Right.

Q. And what was Fred Meyer's function?

A. Well, do you want me to ask—do you want me to give—

Q. What was his job? What did he do?

A. What did he do?

Q. Yes.

A. What I employed him for?

Q. Yes.

A. You want the whole story,—

Q. I—

A. —or "yes" or "no"? I can't answer that "yes" or "no".

Q. Was he the president of Texas Plastics?

A. No, he was not no president.

Q. What was he? Was he the—he wasn't a bookkeeper, he had some job in between. What was it?

A. Do you want me to tell you how I hired him?

Q. Will you please answer the question?

A. Well, I got to tell you how I hired him if you want to know what kind of a job he had and how I hired him, the reason why I hired him.

Q. Well, your counsel can ask you that, sir. I want to know what you employed him as.

A. Well, I employed him this way. I said, "Fred Meyer,—"

Q. Now,—

Mr. Wagner:
You have asked him. Let him answer.

A. You asked me a question.
Q. I wanted to know what the employment that you engaged him for, what it was, not how it came about. Your Honor,—

The Court:
That's correct. What did you hire him as, a bookkeeper or a what?
A. No, I hired him, I sent him down here—I hired him—I picked an ad out of the New York Times, I had twenty-five men—

The Court:
Now, that isn't important. We are not interested in that.
A. Oh, you are not interested? All right.

The Court:
No.

A. I finally decided—I decided I would send Fred Meyer down here; I didn't know Fred Meyer from Adam, but I finally hired him and I sent him down here to be plant manager of the Texas Plastics, Incorporated, which I had decided to make my own bags. Plant manager.
Q. You want to make that clear distinction, he was a plant manager?
A. Plant manager.
Q. And so what did he do then?
A. Well, what does a plant manager do?
Q. Well, you tell me, sir. I asked you the question.

A. Well, let me think, now. Huh. Huh. I sent him down here, I bought all the equipment and all the machinery, the printing presses, bag making machines, the extruders.

Q. You bought it?

A. I bought it all.

Q. Did you order it?

A. I ordered it.

Q. And you ordered it from Modern Machinery Company?

A. I ordered it from all the different places that I thought would give me good machines.

Q. Did Fred Meyer order—

A. No.

Q. Did he have anything to do with it?

A. No.

Q. You ordered it?

A. I ordered it.

Q. And if Fred Meyer said that he did and that he designed that machinery, he would be wrong, wouldn't he?

A. No, I don't think he would be wrong either.

Q. Then if you say that you ordered it,—

A. I ordered it.

Q. Well, tell me, which one did?

A. I ordered it.

Q. Okay.

A. I ordered it.

Q. Thank you.

A. But when he says he redesigned—

Q. That's enough.

A. Now, wait a minute, now.

Q. You have a lawyer here to—

A. All right, now,—

The Court:

Let him go ahead and make this explanation. When he says what?

A. When he says he redesigned—a lot of this equipment we ordered, Fred Meyer redesigned it to make it more efficient, but I ordered it. Now, when he says he redesigned, he designed some of it, that was correct, but I was the boy that says "That's what I want" I am buying it, not Fred Meyer.

Q. And you ordered it from Modern Plastic Machinery—

A. What's that?

Q. You ordered the extruder from Modern Plastic Machinery Company?

A. Yessirree, before I ever hired Fred Meyer. In fact, I bought all the equipment before Fred Meyer knew he had a job.

Q. All right. That was some time, if he was employed on February 1, 1954, it would have been before that time that you ordered it, wouldn't it?

A. Right.

Q. Did you engage Mr. Meyer to come down here and operate a—the Texas Plastics?

A. I engaged him to operate—I engaged him to be plant manager, and set up the machinery as it arrived.

Q. And that was his only function?

A. That was supposed to be his only function. If he put his nose into anything else, he didn't have a right to do it, had no authority. He was supposed to be plant manager.

Q. Now, you have other directors in Texas Plastics besides yourself, don't you?

A. What's that?

Q. You have other directors in Texas Plastics besides yourself, don't you?

A. What do you mean by directors?

Q. Well, a corporation ordinarily has officers and directors.

A. Yes, right, correct.

Q. So there are others besides yourself?

A. Yes, just two more, but I do the directing.

Q. I see. And who are they?

A. My son.

Q. And who else?

Q. Who is the other one?

Q. Well, do you know?

A. Huh. Huh. I would have to look at my corporate books and see who the other one is. We usually have three directors. We are formerly established here.

Q. All right.

A. This Texas Plastics Corporation is a twenty year old corporation,—

Q. All right, sir.

A. —used to be the Bonita Fruit Company, but—

Q. I understand. I didn't ask you about that. I just asked you who the directors were.

A. Well, I think it is one of my officers in various corporations. I have so many different officers in the corporations, I can't figure them.

Q. Now, then, you engaged Mr. Fred Meyer, you must have engaged him prior to February 1st, having received his ad and decided that's the man you wanted to employ, wasn't it?

A. Uh huh.

Q. And then what did you ask him to do, to come down here?

A. Well, I described—he had never been down to the Rio Grande Valley before, I understood, and I

described what a wonderful place the Valley was and nice living conditions here and that I wanted to put up a plastics division and I told him it was a great opportunity for him to come down here and I needed a man to run my plastics plant, which I decided to put up.

Q. And you engaged him on or around February 1, 1954, and you had in mind for sometime previous to that putting up your own plastics plant?

A. Oh, yes, sure. I made investigation, I went around to various points and I saw—

Q. All right, sir, just please—

A. Yes.

Q. —confine yourself to answering my qeustions. Now, did you immediately send him down here or did he do something else?

A. No, while the—while we were ordering the machinery, well, I sent him to—while our printing press was being built, I sent him to—before he come down here, I believe I sent him to a Hudson shop, who built a printing press, out in Wisconsin somewhere, at Green Bay, Wisconsin, and I also had him in New Jersey, where he ordered treating printing—that is they treat this film before we could print it, and I had him work with the various engineers of the Du-Pont people and the Union Carbide people, I believe, to build up an extruder which I had bought which needed modification.

Q. All right. Now, sir, didn't you also send him around to Roto-Lith's plant to see their operation?

A. Yes.

Q. You wanted him to observe just a going business, didn't you?

A. Well, no, it wasn't—we sent him—we sent him to not alone Roto-Lith, but I told him just go around,

look at how—see how these various bags—because at that time, Fred didn't have no experience about bags and making too many bags. In fact, nobody did, everybody got in new on the deal.

Q. You were trying to get him started out right by the observation of other businesses?

A. Yes.

Q. As a matter of fact, you went by yourself and looked at it, didn't you?

A. Right, correct.

Q. And Mr. Pfaffenroth from your office has been out—

A. Yes.

Q. —and seen how it goes on,—

A. Yes, that's right.

Q. —and that took place over a period of several months while Fred was getting machinery?

A. Probably three months time.

Q. That's right.

A. Mr. Borak wasn't the only plant we observed. We observed a lot of other plants.

Q. I am quite sure you did, sir,—

A. Sure.

Q. —but you did go to the Roto-Lith plant?

A. Oh, yes.

Q. And observed what they were doing and their method of operation?

A. Yes, that's right.

Q. And you also instructed Mr. Meyer to find out what was the best ink supplier and the various things that go into making these rolls and so on?

A. Ask questions, that's right.

Q. That's right, ask questions, get information, for your benefit?

A. That's right.

Q. But you didn't ever tell Mr. Borak that you were going in competition with him up to that time, had you?

A. Oh, I don't know.

Q. You don't know?

A. I didn't—in fact, I we discussed that right along, that we were tentatively going, because we discussed—

Q. As a matter of fact, you told him that you were going to make bags for your own use, isn't that correct?

A. No, sir.

Q. And didn't he say that you were welcome in his plant to observe the operation?

A. Right, right, yes, that's right.

Q. And that there was later a cut-off date when he thought it not proper for you to have your representatives in to determine how he operated, because—

A. Oh,—

Q. —you then had told him you were going to be in competition with him?

A. No, that is a lot of malarkey.

Q. That is not true?

A. No, that isn't true, not true. We didn't need to look at Borak—Mr. Borak's place, because we had access to plenty others.

Q. Well, you valued his opinion, didn't you?

A. Oh, yes,—well, like anybody else that is in the trade, certainly we ask questions, but that isn't to say that we put stock on his opinions, or we followed his opinions.

Q. No, I didn't ask you that.

A. We built a plant that is so far outstanding that Borak can't even touch it now.

Q. You are probably one of the tops.

A. We are—we are going—we are not one of the tops, we will be, that's for sure.

Q. Now, in connection with that, Mr. Borak came down to—he was in Corpus in May of—

A. Uh huh.

Q. —1954, wasn't it?

A. That's right.

Q. And it was some time in May, it was after—Mr. Borak had his anniversary or birthday on the 12th of May, so it was sometime after that, that you met him in Corpus?

A. Right.

Q. Now, sir, did you ask him to go over to Mathis and Elsa with you to observe the installation of these bag making machines?

A. No, wait a minute. Don't get confused now. Get it right. We didn't put no bag making machines at Mathis, now.

Q. All right, I will limit it to Elsa.

A. Well, wait a minute now. We are at Corpus now. Follow me.

Q. Yes, sir, I will follow you, if you will tell me, isn't it true that you invited him to go with you to either Mathis or Elsa to observe the running of some rolls of printed film on your bag machines which were about to be installed or had been installed?

A. Yes, he was—we had a nice friendly ride. You want me to tell you how we went around? Mr. Borak called me up—

Q. Well, tell me, isn't that what happened, didn't you invite him to go?

A. No, no, no, I can't answer—tell you "yes" or "no" on that without me giving you the explanation.

Q. Well,—

A. You want me to give you the explanation how we—what we—Mr. Borak and I did? I am willing to do it. If you don't want it, why, okay.

Q. Well, did it wind up that he went over there with you?

A. What's that?

Q. Did it wind up that he went over to Elsa with you?

A. Yes.

Q. And you waited two or three days before some rolls came in from New York, they were late getting there?

A. Well, I wouldn't say "yes" or "no" on that.

Q. But that is possible, isn't it?

A. Could be.

Q. And you had a mechanic down from the bag making machine—

A. Correct, that's right.

Q. And you had your own men there?

A. Yes.

Q. Was Mr. Meyer there?

A. No, don't think so.

Q. He wasn't there?

A. No, don't think so.

Q. Didn't observe anything that went on?

A. Hadn't come down yet.

Q. All right. And ultimately the rolls did get in and you put them on the bag making machine?

A. No, no.

Q. You never did run any bags?

A. No, I don't think so. We weren't ready yet. We weren't set up. Mr. Meyer hadn't come down yet and we weren't ready or set up. As I recollect it,—

Q. I merely asked you the question did he or didn't he?

A. All right. All right.

Q. But you were with Mr. Borak for several days in May, weren't you?

A. Not several days. Not several days. What do you call several?

Q. Two or three days.

A. Well, no, I wasn't with him that long.

Q. How long were you with him?

A. Well, you want me to tell you?

Q. Yes.

A. All right. As I recollect it, Borak come in on a Sunday night and we had breakfast together Sunday morning and we drove up to Mathis and we counted the bags up there, as Mr. Simpson testified, and after that was through, we went for lunch, and then I took him to Cuddihy Airport and I took him in my plane, I fly my own plane, down here, and—

Q. All right, now, this—

A. I flew down to McAllen, Texas, and from McAllen, Texas, the next morning, or that afternoon, I think,—we got here pretty late, I think, that afternoon, I think he went to the hotel and I went somewheres else, but we met him that morning—that next morning and we went over to Texas Plastics at Elsa and the plant wasn't in operation yet, our printing presses wasn't in, they were—as I recollect it, but the Simplex Bag Making Machine mechanic was there setting up the first bag machine. That's all I know about it, and Mr. Borak and I walked around the plant and I says, "Harry, here is where we are going to put up our new machines," and that's what we are going to do, and Harry says, "All right, that's fine, I'll give you any advice that you want," and we were very nice and friendly, everything was lovely, 'til we discussed the shortage of bags, and the only

reason we are here today is we were short counted on bags, we were cheated on bags, we abolustely were cheated on our bags,—

Q. Now, when did this—

A. —there was a shortage—

Q. —discussion arise?

A. —or otherwise we wouldn't be here today.

Mr. York:

Your Honor, we object to this. This is clearly—

The Court:

Well, I will just try to stop him myself hereafter when he answers a question. Now, I will ask you a question while we are interrupted. You just said that that was when you discussed the shortage of bags and you had just finished saying that you went up to Mathis and made the count up there and you said down here at Elsa, you discussed the shortage of bags with him.

A. Now, wait a minute. Your Honor, Mr. Borak came to see me at Corpus Christi,—

The Court:

Yes, I understand that. I don't want to start al over again.

A. Then we drove to Mathis and we counted the bags up there,—

The Court:

Yes.

A. —and then we went in my plane and came down to McAllen and the next day, we went over to Elsa.

The Court:

Yes.

A. Now, that is the—and our plant wasn't set up yet.

The Court:

Now, you have testified to that.

A. Yes, sir.

The Court:

Now,—I withdraw the question.

Q. All right, now, this occurred, as I say, some time in May of 1954, or—yes, 1954. And you didn't discuss a shortage of bags until after you had already been at Elsa?

A. Oh, we discussed the bags, the shortage of bags, because—now, I said—

Q. You did not discuss the shortage of bags until you had gotten to Elsa?

A. No, no, oh, no. Wait a minute. Wait a minute. You want me to tell you?

Q. I want you to answer me "yes" or "no."

A. No, I can't do that, I refuse to answer "yes" or "no."

Q. You do refuse to answer the question?

A. "Yes" or "No," because we discussed that the—

Q. All right, that's enough.

A. All right, place your question again and maybe I can—place your question again.

Q. Be glad to. You have testified that you went to Mathis, to McAllen, to Elsa.

A. Yes.

Q. But you have also testified that you didn't discuss the shortage of bags until you were in Elsa.

A. No, I said—that's—I withdraw that, then.

Q. You withdraw it?

A. I withdraw it. We discussed the shortage of bags at Mathis, when we counted them.

Q. Well, you were mistaken, then, a little while ago when you told me you discussed it at Elsa?

Mr. Wagner:
I will object to him arguing with the witness.

The Court:
Overruled.

Mr. Abbott:
That is not an argument, sir.

The Court:
Overruled.

Q. You were mistaken?

A. We discussed it—

Q. Please just answer the question.

The Court:
I think the question is answered, counsel.

Q. Yes, sir. It was also at Elsa, on that occasion, that you informed Mr. Borak that you had two bag machines on the place and six or eight additional bag machines ordered, didn't you?

A. Uh huh, I suppose so.

Q. And didn't he ask you, "Well, what in the world are you going to do with so many bag machines for your local operation?"

A. He did?

Q. I am asking you, sir. He did ask you that question, didn't he?

A. I don't think so.

Q. And wasn't it your—that was the first indication he had ever had that you were going to go into competition with him? You don't know? All right, sir.

A. What would I order so many bag machines and set up a big plant like that if I wasn't going in competition with him?

Q. But that is the first—

A. He knew we was going to go into competition. I told him we was going to go in competition with him.

Q. Yes, sir, on that day, you did.

A. No, I told him long before. It was no secret. I was going in competition with—not with Roto-Lith. Roto-Lith didn't mean nothing to me in competition. I was gong in competition with Continental Bag Company, real competitors, Mill Print.

Q. Well, because you were in a position where you couldn't buy from them any more, you had to go into business for yourself?

A. I couldn't buy from them? I can buy—I can buy a hundred million dollars worth of bags off of them right now, just like that. All I have to do is pick up the telephone; Mill Print would sell me a million bags just like that, or ten million or a hundred million, and Harry knows it.

Q. And that would be for cash?

A. What?

Q. That would be for cash, wouldn't it?

A. For cash?

Q. Yes.

A. What do I have to buy for cash for when I got plenty of credit?

Q. Well, as a matter of fact,—

A. I got a million dollars credit with the Chase Bank in New York and I ain't using it.

Q. All right, sir, but in 1954, with your corporations, all of them, and the forty subsidiaries, you had a net profit of $58,000.00, didn't you?

A. How much?

Q. $58,000.00.

A. Fifty eight thousand?

Q. Yes, sir, of all these corporations.

A. Is that right?

Q. Well, I am asking you, sir, if that isn't—

A. I don't know.

Q. All right. If Dunn and Bradstreet had that report, that—

A. Oh, well, that's all right.

Q. All right.

A. Don't make a damn what Dunns and Brad—they don't know how many salaries I drew before I took the calories out, and how much bonus I paid out.

Q. Or how many dividends?

A. Or how many—no, dividends, we don't pay out. We pay out bonuses. Probably paid out a half a million dollars in profit sharings before we paid the taxes.

Q. Now, Mr. Vahlsing, on or around February the 15th or 16th of 1955, did you finally consent to talk to Mr. Borak on the telephone?

A. Did I finally consent to? I never refused to talk to anybody on the telephone. I am not a dodger. Anybody can talk to me on the telephone; when he can get me.

Q. Well, yes, sir. That's—that's right.

A. I am hard to get sometimes.

Q. Isn't it true that you did talk to him on or about that day?

A. Oh, I wouldn't recollect.

Q. Well, do you remember a conversation with Mr. Borak—

A. I don't—

Q. —in which—sir? You don't?

A. I don't know, man. You want me to tell the truth.

Q. Would you like for me to ask the question before you answer?

A. Yes, yes, go ahead.

Q. All right. Did you have a conversation with him on or about that date in which he told you that Max Lutz, Burton Benson or Ed Boler or any one or more or all of them were telling him of things that Fred Meyer had said about him?

A. Uh huh.

Q. And that he wanted you to call Max Lutz on the telephone and tell him it was not true? Do you remember a conversation like that?

A. No.

Q. You do not?

A. Sure don't. No. No.

Q. Well, I will ask you this, then, did Mr. Petchesky, your attorney in New York, ever inquire of you about this?

A. No, I didn't—I just talked to Petchesky and told him Mr. Borak sued us for a million dollars, I said "Go ahead and defend the suit, that's all right," a million dollar suit, wanted to get a million dollars. I don't know what it was about or where it come from.

Q. I didn't ask you anything about that. I am merely asking you if Mr. Petchesky told you—

A. Petchesky.

Q. Petchesky?

A. Uh huh.

Q. —if Mr. Petchesky told you that Mr. Borak had called him, quite upset, about some stories that Fred Meyer was telling down here and that he wanted to talk to you about it?

A. Who wanted to talk to me?

Q. Mr. Borak.

A. Yes.

Q. Did Mr. Petchesky tell you that?

A. No.

Q. He did not?

A. Not that I recollect. He might have told me that but I can't recollect that.

Q. That is just a small item?

A. Yes, I don't know—

Q. All right.

A. I don't know whether he did or not, I just don't. I wouldn't say "yes" or "no," it might have happened, it might not have happened, I don't know.

Q. And you deny, then, or you don't have any knowledge that you told Mr. Petchesky that you would not call Max Lutz?

A. No, I don't think so. Why should I call Max Lutz? What did that have to do with me? I had no business with Max Lutz, at that time.

Q. All right, sir. And then you have no recollection of a conversation with Mr. Borak on or around the 15th of February, '55, where he told you these stories,—

A. Well,—

Q. —and asked you to call Max Lutz and say simply that they were not true?

A. What wasn't true?

Q. That you had—that he would short count people—that he was a crook,—

A. Who?

Q. I will start again, sir. I'm sorry,—

A. Yes.

Q. —I am perhaps confusing you.

A. You are kind of confused, I think.

Q. Yes, sir, I probably am. Did Mr. Borak call you on or about February 15, 1955, and have a telephone conversation with you?

A. Uh huh.

Q. He did?

A. I don't know. Wait a minute. He did? You said "He did."

Q. Well, I thought you said "uh huh."

A. No, I didn't say. I am waiting to hear what it is all about.

Q. All right, now, we will start again.

A. Yes.

Q. Did he call you on or about that date—

A. I don't—

Q. —and have a telephone conversation—

A. I don't recollect.

Q. —in which he told you that Max Lutz had told him about the stories that Meyer was circulating down here and that he wanted you to call Max Lutz and just state that the stores were not true, that it hadn't happened?

A. Now, wait a minute. That is pretty round about here. Borak called me?

Q. Yes.

A. Now, Borak is calling me and I should call Max Lutz, is that the idea?

Q. That is correct.

A. I should call Max Lutz?

Q. Yes.

A. And I should ask Max Lutz what?

Q. And merely state to Max that if anybody has said that, it is not true, because we didn't—it didn't happen.

A. What is not true?

Q. The stories that are the subject of this lawsuit, Mr. Vahlsing.

A. What is not—well, I don't know what the subject is.

Q. All right, sir.

A. That you say that Max—whatever he is—

The Court:

Wait a minute. Let me ask you a question.

A. Yes.

The Court:

I am going to ask you a question. Did Mr. Borak call you and complain to you that Mr. Meyer had made some false statements about him down here?

A. Yes. I will answer that kind of a question. Yes.

The Court:

Did he tell you what those false statements were as reported to him?

A. Yes, he reported—he told me—now, I don't know, Judge, Your Honor,—

The Court:

No,—

A. —whether it was that particular month or what time it was, but Borak told me, at—not at that particular time, but several other times, that Fred Meyer made these statements, see.

The Court:

What statements?

A. That Fred Meyer came down here and called him—he says the—that he called him a crook or thief or whatever he says now. Well, I says, "Mr. Borak, as far as my knowledge is concerned, I don't know anything about it," and I says, "I am going to talk to Fred Meyer about it and if it is so, why it should be retracted," and I talked to Fred Meyer about it and he says, "Boss, I never said it. I never said it. All I told him, I told these people that we were short counted." "Well," I says, "then you told the truth, if you didn't say anything else, you were short counted." Now, that is as far as I know about it, Your Honor.

The Court:

All right, did Mr. Borak ask you to call a man named Lutz?

A. No, no, I don't know—

The Court:

To correct something?

A. —anything about that.

The Court:

Go ahead, counsel.

Q. Now—

A. Never called Mr. Lutz, or never called anybody, never called anybody.

Q. Did he ask you to make a retraction of it at any subsequent date?

A. Yes, he asked me about a retraction. Now—the—in fact, I—

Q. Did you do so?
A. No, no, I didn't make no retraction,—
Q. All right.
A. —because—
Q. All right.
A. —I asked Fred Meyer and he denied it.

Mr. Abbott:
I would like to have the last part struck. I think—

The Court:
Well, he has already testified to it anyway. Overrule the motion.

Q. As a matter of fact, you didn't make a retraction, did you?
A. I didn't.
Q. No, and you told him you wouldn't?
A. No, I didn't say I wouldn't, just didn't, that's all.
Q. Just didn't. Would it have hurt you to have made a retraction, if anything had been said, that they were not true?

Mr. Abbott:
I will withdraw the question. Please mark this.

(Whereupon Plaintiff's Exhibit No. 7 was marked for identification.)

Q. I have here what has been marked Plantiff's Exhibit No. 7 and ask you if you can identify it and recognize the signature?
A. Oh, yes, that's my signature.
Q. Do you know what the instrument is?

A. Have to read it. What is this, a release? I say, this is a release, isn't it?

Q. Well, let me show it to your counsel. Do you recognize it?

A. Yes. Oh, yes.

Mr. Abbott:

(Passing instrument to Mr. Wagner) Any objection to it?

Mr. Wagner:

No. (Passing instrument to Mr. Abbott.)

Mr. Abbott:

Now, if the Court please, I would like to show this —this has been identified—

The Court:

Just have the Clerk—

Mr. Abbott:

Yes, sir (passing instrument to the Court).

The Court:

All right (passing instrument to Mr. Abbott).

Mr. Abbott:

I will merely state the substance, if I may, to the jury. (Reading Plaintiff's Exhibit No. 7 to the jury.)

Q. You did have this agreement that all of the matters that had been in controversy were wiped out to that time?

A. Right.

Q. And now—

A. I suppose so. I signed it and that's what the document says when you read it.

Q. Now, you have stated that, as I understand it, it was a lie that Harry Borak talked to you about a retraction of these stories by Fred Meyer, this morning on direct examination, is that true?

A. Make that question again. Let's have it—

Q. Did you state this morning—have you stated that you did not have conversations with Harry Borak about a retraction of the stories that Fred Meyer was alleged to have said?

A. I didn't say—I did not say that we had—I did not say that we had no conversation with Mr. Borak in reference to that. I didn't say that.

Q. As a matter of fact, you have had, haven't you?

A. Yes, we have. In fact, we had—right in front of your office, in front of Mr. Cox' office, right there, is that right?

Mr. York:
I am not Mr. Cox.

A. Oh, no?

Mr. York:
No, sir.

A. I thought you were Mr. Cox.

Mr. York:
My name is York, Mr. Vahlsing.

A. All right. Mr. Cox, who is Mr. Cox? In your office.

Q. Well, we will get to that in a moment.

A. All right.

Q. You talked—you ran across Mr. Borak one time in the Casa de Palmas Hotel, didn't you?

A. Yes, I did.

Q. And took him out to your precooling plant?

A. Yes, that's right.

Q. And during the course of that, discussed the possibility of the retraction?

A. Right. Correct.

Q. Now, you were the one that came up and talked to him, he was there in the lobby, wasn't he?

A. No, we just "helloed" together, we sat down, like—we wasn't fighting each other, we were just nice, friendly people, we weren't fighting each other, I had nothing against Harry Borak except that I didn't get a just count, that's all. Everything was settled between us up 'til that point, 'til Fred Meyer stepped in.

The Court:

You will just have to answer the questions and stop.

A. All right.

The Court:

We had just might as well get through here.

A. All right.

Q. Everything between you was all right until Fred Meyer stepped in, is that what you said?

A. Yes. Well, up 'til that point, 'til that controversy come along.

The Court:

This release that was executed,—

A. What's that?

The Court:
This release that was executed, was that executed after you had all this controversy about the count,—

A. That release—

The Court:
—shortage of the count?

A. This release was executed, Your Honor, right after the million dollar lawsuit was settled.

The Court:
All right.

A. That is the execution of the settlement of the million dollar lawsuit.

The Court:
All right, but was it also after you had already had this controversy with him about the shortage—alleged shortage or short count, and released him from everything when you settled that?

A. Yes, he allowed us seventeen hundred or eighteen hundred dollars on the short count.

The Court:
Yes, I understand that, but this release, was it executed, after you had already raised the question with him about the shortage of the count? It is in September, 1954.

A. That's when that release was?

The Court:
That's what the date says.

A. Well, we had the controversy all previous to that, Your Honor.

The Court:
All right.

A. All previous to that.

The Court:
All right.

Q. And up to that date, that settled everything between you, didn't it?

A. That settled everything. They allowed us seventeen or eighteen hundred dollars, they took off a short count on us.

Q. I beg your pardon? Do you know what the terms of the settlement—

A. No, I don't know exactly what the terms of settlement was, but I was given to understand that Mr.—

Q. Just—I am not interested—

The Court:
I will sustain the objection.

Q. You don't know what it was, do you?

The Court:
Well, he has already said he didn't, in effect.

Mr. Abbott:
All right.

The Court:
He said he didn't, that he was given to understand, and I want to stop that,—

Mr. Abbott:
All right.

The Court:
—and you better stop it, don't go any further.

Mr. Abbott:
We have no further questions at this time, sir.

The Court:
All right.

Mr. Wagner:
Call Mr. Snider, please.

The Witness:
Am I through?

The Court:
Yes, sir, you may—

Mr. York:
We are not excusing him.

Mr. Abbott:
We don't wish to excuse him, Your Honor.

The Court:
All right, you wait outside.

Mr. Abbott:
Your Honor, may I approach the bench with counsel?

The Court:
Oh, yes.

(Whereupon a conference was held between the Court and counsel, at the Court's bench, out of hearing of the reporter and jury.)

JOHN HARRY SNIDER, having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Wagner:
Q. What is your name?
A. John Harry Snider.

The Court:
Sir?

A. John Harry Snider.

The Court:
John Harry Snider?

A. Yes, sir.
Q. Where do you live, Mr. Snider?
A. San Juan, Texas.

Mr. Abbott:
Your Honor,—is this man on your list?

Mr. Wagner:
No, no.

Mr. Abbott:
I, at this time, wish to object to the testimony of this witness on the grounds that we asked the defendant, by interrogatories, to supply the names of their witnesses, and this man comes as a surprise to us.

Mr. York:
This is the third witness.

Mr. Abbott:
The third time.

Mr. Wagner:
I can only say, Your Honor, that I supplied them, under oath, with every witness that I knew that I was going to use or even might use. This boy, I never met until today. In fact, I didn't know about this Lutz thing at the time they served that list on me. He has to do with that.

The Court:
All right.

Q. Mr. Snider, how old are you?
A. Twenty three.
Q. Did you work for Mr. Max Lutz last year, in the 1955 produce season?
A. Yes, sir, I did.
Q. Were you working for him in the early part of the year?
A. Started for him in January.
Q. Started in January, 1955?

A. Yes, sir.

Q. What kind of work were you doing for him?

A. I am his shed foreman.

Q. I didn't hear that. Shed—

A. I am his shed foreman.

Q. Will you speak up so that the last juror back here can hear you, Mr. Snider, and then I am sure we all will. Did you use polyethylene bags to package the vegetables you were running last year?

A. Yes, sir, we did.

Q. Whose bags were you using?

A. Well, sir, we were using Roto-Lith and Texas Plastics.

Q. And I will ask you if, in the course of that operation, you ran into any discrepancies in the number of bags that the boxes said you were putting out there and the shipments that were being checked out?

Mr. Abbott:

We object to the question, Your Honor.

Mr. Wagner:

Well, withdraw it. I know it is very ineptly framed. I'm sorry.

Q. Did any question come up there about bag shortages?

A. Yes, sir, there was.

Q. In what way?

Mr. Abbott:

Your Honor, I don't see the materiality of the issue arising up there with this young man. The plaintiff knows nothing about it other than that they were his

boxes, and that's all, and I don't think they should go into it.

The Court:
I will overrule the objection. I think maybe your objection is really to the weight of it and not to its admissibility. Did you count any bags?

A. Yes, sir, I did.

The Court:
Yourself?

A. Yes, sir, I did.

The Court:
All right, proceed from that.

Q. All right, and what did you find when you counted the bags?
A. Well, sir, there was some shortage in the boxes.

The Court:
And how many boxes did you count?

A. I imagine I counted about fifteen or twenty.
Q. Was anything done with reference to unopened or sealed boxes, in connection with that shortage that you were discovering?
A. Yes, sir, I was instructed to take some boxes to the office and store them in the upstairs office.
Q. By whom were you instructed to do that?
A. Mr. Lutz.
Q. And where is the office that you talk of, is it on the packing floor or—

A. It is on the south end of the building, upstairs.
Q. On the south end of the building?
A. Yes, sir.
Q. And did you take a number of cartons of Roto-Lith boxes and store them up there in the office?
A. I did.

Mr. York:
May it please the Court, this is leading the witness and we object—

The Court:
Well, he has already said he did.

Mr. Wagner:
Withdraw the question, then.

The Court:
Overruled.

Q. Let's see. Now, the season runs 'til about when?
A. We wind up about the middle of May.

Juror:
I can't hear him, Your Honor.

The Court:
Speak up, the jurors say they can't hear you.

A. About the middle of May.
Q. And the obxes you took up there and stored in the office, did you take up boxes that had been opened, or sealed boxes only?
A. No, sir, they were still sealed.
Q. Let's see; that was 1955, wasn't it?

A. Yes, sir.

Q. Did you go back to work for Mr. Lutz at this produce season?

A. Yes, sir, I started with him again this October.

Q. This past October?

A. Yes, sir.

Q. And when you went back there, were those boxes still up there in the office?

A. Yes, sir, they were.

Q. And did they remain there until some recent date?

A. Yes, sir, they remained there until about two weeks ago.

Q. And about two weeks ago, what happened?

A. A couple of gentlemen came in and I was instructed to put them in a car that was parked downstairs.

Q. Who instructed you to do that?

A. Mr. Lutz.

Q. Do you remember exactly how many boxes there were that you were insturcted to put in this truck downstairs?

A. No, sir, I don't remember exactly.

Q. Well, approximately.

A. About twenty.

Mr. Wagner:

That's all.

Cross Examination.

By Mr. Abbott:

Q. When did you quit working for Max Lutz, Mr. Snider?

A. I still work for him.

The Court:
Sir?
Q. In 1955, when did you quit?

Mr. Wagner:
Speak up, Turner. Your Honor, he said, "I am still working for him."

A. It was in about April.
Q. About April. You didn't finish out the season, then, did you?
A. No, sir, I didn't.
Q. Would you want to tell us why?

The Court:
Speak up.

Q. Would want to tell us why you didn't?
A. I went back with my father on the farm.
Q. Now Mr. Snider, how do you spell your last name?
A. S-n-i-d-e-r.
Q. That's what I thought. As a matter of fact, you were discharged for cause by Max Lutz, weren't you?
A. No, sir, I was not.
Q. Now, do you remember getting into a fight with Max Lutz, down in the city of McAllen, in one of the cafes or restaurants there?
A. I have never been in a fight with Mr. Max Lutz.
Q. You remember that you had a little altercation with him, though, didn't you?
A. We had an argument, yes, sir.
Q. And you indicated that you were going to beat him up?

A. No, sir, I did not.
Q. What did you indicate?
A. I just had a misunderstanding with Max and—

The Court:
Speak out.

Q. Well, what was the misunderstanding? Isn't it a fact that he accused you of converting some of his funds to your own personal use?

Mr. Wagner:
Now, Your Honor, I am going to object to that. This isn't a proper ground on which to impeach a witness.

The Court:
I will overrule the objection. I think that—I will overrule it. It may go to his credibility. Not that—as bearing on his present feelings and his present attitude and his present testimony. Overruled.

Q. Now, isn't that what happened?
A. No, sir, it wasn't.
Q. Isn't that what he accused you of?
A. That's what he accused me of, yes, sir.

The Court:
And it wasn't true?

A. No, sir.
Q. And that was your altercation, wasn't it?
A. Yes, sir.
Q. And that's why you didn't work there any more after April,—
A. Yes, sir.

Q. —1954—'55?
A. Yes, sir.
Q. And now you are working for him agai
A. Yes, sir.
Q. Were there charges filed against you in the J. P. Court over this matter?
A. No, sir.
Q. Over the altercation?
A. No, sir, no charges filed.
Q. Have you been before the J. P. on various other charges?

Mr. Wagner:
Now, Your Honor, again, I am going to renew—

The Court:
I sustain the objection.

Mr. Wagner:
—my objection, that isn't proper.

The Court:
I sustain the objection.

Q. All right, sir. Now, then, Mr. Snider, you know Fred Meyer here?
A. Yes, sir.
Q. As a matter of fact, you, while you were shed foreman, you were using Texas Plastics bags for some time, weren't you?
A. Yes, sir.
Q. And then you started using Roto-Lith bags?
A. Yes, sir.
Q. Mr. Meyer, did he come around the shed and see you from time to time?
A. Yes, sir.

Q. He would come early in the morning or late at night, wouldn't he, or in the middle of the afternoon?

A. Yes, sir, there has been times that he has dropped in.

The Reporter:

What was the answer?

The Court:

Speak out, please.

A. There has been times that he dropped in.

Q. And talked to you, didn't he?

A. Yes, sir.

Q. And didn't he tell you to take a shipment that came in and weigh the boxes and find out which boxes were short, by so doing, and give you a chart as to how to do it?

A. No, sir, he did not.

Q. What did he do?

A. He didn't tell me anything about the shortage at all.

Q. What did he tell you?

A. Nothing concerning the Roto-Lith bags.

Q. Not a thing?

A. Not a thing, no, sir.

Q. And did Mr. Lutz tell you about it?

A. Mr. Lutz told me to take the bags and count them, yes, sir.

Q. Take the boxes and weigh them first?

A. Yes, sir.

Q. And then count the ones that were lighter weight than the others?

A. Yes, sir.

Q. Well, he also told you to take the boxes that were the lightest weight and put them up in the store room, didn' the, to hold them, that is those twenty four boxes that you were talking about?

A. No, sir, he did not.

Q. What did he tell you?

A. He had the boxes in the downstairs office and he told me to move them to the upstairs office.

Q. Yes, on those particular ones.

A. I don't know where they came from. They were just in the office.

Q. And you don't know who had access to them, they were just downstairs?

A. Yes, sir.

Q. And you don't know what happened to them, do you?

A. I don't understand.

Q. You don't know what happened to the boxes from the time they were received from the transportation company until the time they were transferred from on the floor upstairs at the south end of the building, you just saw them around there.

A. Yes, sir, I knew that they were there.

Q. And those were boxes that had been picked out and put out there to be transferred upstairs, weren't they?

A. I do not know.

Q. You do not know?

A. No, sir, all I know is I was told to take them upstairs and that's what I did.

Mr. Abbott:

I have nor further questions, Your Honor.

Mr. Wagner:

Call Mr. Turner.

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TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT.

No. 16,434

TEXAS PLASTICS, INC., and FRED J. MEYER,

Appellants,

versus

ROTO-LITH, LTD., and HARRY BORAK,

Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(ORIGINAL RECORD RECEIVED DEC. 14/56.)

The Court:
You are excused.

DILLARD H. TURNER, having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Wagner:
Q. What is your name?
A. D. H. Turner, Dillard H. Turner.
Q. With what concern are you connected?
A. Pattison's Southwest Laboratory of Harlingen.

Mr. Abbott:
Your Honor please, the same objection we have had before with respect to the other witnesses.

The Court:
All right.

Mr. York:
This is the fourth witness, may it please the Court.

Mr. Wagner:
Your Honor, may I speak to the Court? I didn't know anything about this bunch of boxes and I made arrangements for them after I told them who my witnesses were.

The Court:
I will let him testify. He gave his name here Monday morning, anyway.

Q. Mr. Turner, you say you are with Pattison's Southwest Laboratories?

A. Yes, sir.

Q. Where are their laboratories?

A. 211 East Monroe, in Harlingen, Texas.

Q. Did I recently approach your firm with reference to making a check of the contents of cartons containing polyethylene bags?

A. Yes, sir.

Q. Did you subsequently go to McAllen and pick up some cartons containing polyethylene bags?

A. Yes, sir.

Q. Will you refer to your records so that you can give us the exact date that you went up there?

Mr. Abbott:

Your Honor please, apparently this testimony is going to go to some report that has been made by this laboratory.

Mr. Wagner:

That's right.

Mr. Abbott:

And I believe it is apparent, from what has developed here before, that these bags have been in the possession of Mr. Lutz for at least a year, to this time, with no showing of any possession or ownership by any one that would keep them from being tampered with, and I don't believe that any testimony by this witness would be relevant or material or competent to prove or disprove a shortage in a box that has had no control over it whatsoever. The question is how far accountable must this manufacturer be?

The Court:

Well, I am going to let this evidence in. I think those are matters for argument to the jury, as to what could have happened to them in the meantime, and the objection is to the weight of the evidence and not to its admissibility. Overruled.

Q. Mr. Turner, do you have any of those boxes that you picked up at McAllen here with you?

A. I brought three of them along.

Q. Are they up here on this floor?

A. No, sir, they are down on the corner in my truck, locked up in the cab.

Q. In your truck, locked up?

A. Yes, sir.

Q. Well, we can bring those up here to exhibit to the jury, in a few minutes, then, can we?

A. Yes, sir.

Q. All right, leaving that for the moment, let's get along with what we are on here. On what date did you go to McAllen to pick up these boxes?

A. On May 12th.

Q. And where did you pick them up?

A. At the packing shed of Max Lutz Company in McAllen, at the office.

The Court:

May the 12th, this year?

A. Yes, sir.

Q. How many boxes did you pick up?

A. Twenty three.

Q. Were they all of the same type?

A. Much the same type boxes. They were in different size boxes.

All right. Now, tell us about the different types of boxes, sizes.

A. There were seven bags, labeled two thousand—

Q. Bags? Seven—

A. Seven boxes of two thousand bags.

Q. Labeled two thousand?

A. Yes, sir.

Q. And—

A. And sixteen labeled "thirty five hundred carrot bags," total of twenty three.

Q. And did the boxes have any markings on them as to the manufacturer?

A. Yes, sir, they were marked as a product of Roto-Lith Company.

Q. Were the boxes sealed?

A. Yes, sir.

Q. Was there any evidence of the seals having been broken, apparent?

A. No, sir, no apparent—

Q. In a general way, describe the manner in which the boxes were sealed.

A. Well, the tops weee sealed across the end and over the top with a plain red colored gum paper. The bottoms were sealed with a nailing machine or whatever it may be called, clamped.

Q. Now, will you tell us what you did with those boxes after they were delivered to you there in that office?

A. I took them to the laboratory in Harlingen.

Q. Let me ask you this, do you know Mr. Carl Judin of McAllen?

A. Yes, sir.

Q. An attorney?

A. Yes, sir.

Q. Was he present there at the delivery of those boxes to you?

A. Yes, sir.

Q. And was an employee of Mr. Lutz there also?

A. There were several employees there.

Q. Well, might as well ask you specifically, do you recognize the young boy who just left the witness stand as one of the persons who were there delivering those boxes to you?

A. I could not swear to that.

Q. You couldn't swear to that?

A. No, sir.

Q. All right, sir. Well, now, tell us what you did with those twenty three boxes that you picked up at Max Lutz' shed on May the 12th.

A. They were individually counted, the bags were counted in each box, and weighed accordingly.

Q. Wait a minute. Wait a minute, you are going much too fast for me. You picked them up in McAllen, didn't you?

A. Yes, sir.

Q. What did you do after you picked them up in McAllen?

A. Carried them back to the laboratory.

Q. Were they in your truck?

A. Yes, sir.

Q. Who drove the truck?

A. I did.

Q. And you drove back to the laboratory with them?

A. Yes, sir.

Q. Were they opened anywhere enroute?

A. No, sir.

Q. And you took them into your laboratory?

A. Yes, sir.

Q. All right, and now then, tell us what you did with those twenty three boxes.

A. They were opened and counted, the bags were counted and weighed.

Q. Individually?

A. Yes, sir.

Q. Did you keep a careful record of the weights and the counts on each box?

A. Yes, sir.

Q. Describe to us, if you will, what system was used in making this count?

A. Well, there were four of us, at times, working on them. I supervised it, did most of the counting myself, and rechecked those that were counted by other members of the laboratory staff.

Q. Well, now, you take a box of 3,500 bags, would you count from one to thirty five hundred in a pile?

A. No, sir, we counted them in hundreds and then made stacks of five hundreds and segregated those with rubber bands so they would not be mixed again.

Q. Do you have with you a summary of your findings as to seven two thousand—well, here, wait just a moment.

Mr. Abbott:

Your Honor, we make the same objection to the testimony of this witness as to the supervision, he has not testified that he counted the bags himself.

The Court:

I will overrule the objection. He said it was done under his supervision.

(Whereupon Defendant's Exhibits Nos. 10 and 11-A and 11-B were marked for identification.)

Q. I will hand you the document marked D-10, Mr. Turner, and ask you what that is?

A. It is a report on the material bags as counted and weighed.

Q. That relates to the seven cartons of two thousand—marked two thousand each?

A. Yes, sir.

Q. And I will ask you what D 11-A is?

A. That is in regard to the balance of the twenty three boxes, containing—marked as containing thirty five hundred bags.

Q. Is that your signature on each of these two reports, D-10 and D-11?

A. Yes, sir.

Mr. Wagner:

We will offer the reports as a summary of this investigation.

Mr. Abbott:

We renew our objection, Your Honor, to the reports.

The Court:

Same ruling. I will admit them.

(Whereupon a conference was held between counsel, out of hearing of the reporter.)

Mr. Wagner:

What do you mean? I am waiting to see if you object.

Mr. Abbott:

I do object.

Mr. Wagner:
Well, let's hear it.

The Court:
I have ruled and they are admitted.

Mr. Abbott:
That was my understanding.

Mr. Wagner:
What I was trying to do, in the interest of time, I want Mr. Turner to bring those boxes up here for an example.

The Court:
Well, let's get this reading over and when they get through with their examination, I would like for you to have them all brought up here.

Mr. Wagner:
Well, but my point was, I wanted to read this to the jury.

The Court:
Go ahead, please.

Mr. Abbott:
Your Honor please, we want to object on the additional grounds it is not shown from what shipments these came or what the result was of the entire shipment, just not isolated boxes.

The Court:
Well, I believe that—you can argue that to the jury.

Mr. Abbott:
Thank you, sir.

The Court:
Maybe they won't pay any attention to it, but—

Mr. Abbott:
Yes, sir.

The Court:
—otherwise—all right.

Mr. Wagner:
I suggest that if counsel wants to cross examine the witness, I would suggest that we do that now; then, while I am reading this, he could be going and getting the boxes, and we would be saving time. Do you want to cross examine him?

Mr. Abbott:
Oh, yes, I want to cross examine him.

Mr. Wagner:
In other words, I waive my reading this to the jury—

The Court:
All right.

Mr. Wagner:
—so we can do two things at the same time.

Cross Examination.

By Mr. Abbott:

Q. Now, Mr. Turner, you don't know anything about these boxes until just around May the 12th,—

A. No, sir.

Q. —is that right? You don't know how long they had been there—

A. No, sir.

Q. —in McAllen, or under whose custody?

A. No, sir.

Q. You don't know how many boxes came with the entire shipment or what the shipment consisted of?

A. No, sir.

Q. All you know is that you got some selected boxes that you counted and on which you have made a report?

A. I picked up the boxes intact, as they were at the shed.

Q. That is the ones that they handed you?

A. Yes, sir.

Q. Now, you say the boxes were sealed?

A. Yes, sir.

Q. And you are satisfied that that is the end of it, you counted what was there, and you don't know anything else about the boxes except that they were sealed?

A. That's right.

Q. And as far as you are concerned, this represents everything that came in the box when it left the factory?

A. Yes, sir.

Q. You are satisfied that that is what happened?

A. Yes, sir.

Q. All right, sir.

The Court:
Could the seals have been—could they have been sealed before that and unsealed and—
A. No, sir.

The Court:
—you wouldn't discover it?

A. No, sir, I would say that they had not. They were in perfect order, apparently the tape was well worn, like the box was, so I would say that they had never been opened. I am sure they couldn't have.
Q. And there is no way that bags could have gotten out, according to your thought?
A. No, sir.

Mr. Abbott:
All right, sir.

Mr. Wagner:
Would you go bring those boxes up that you have down there, Mr. Turner, while I am reading this?

The Court:
Well, we will take a fifteen minute recess at this time. Don't discuss the case, lady and gentlemen, and don't let anybody discuss it in your presence.

(Whereupon a fifteen minute recess was taken.)

The Court:
All right, proceed.

Re-Direct Examination.

By Mr. Wagner:

Q. What is this carton I hand you, Mr. Turner?

A. One of the cartons I picked up at McAllen, on the 12th of this month.

Q. Is the box numbered?

A. Yes, sir.

Q. Who put that number on it?

A. Mr. Judin put one on it and I numbered it myself and marked it accordingly.

Q. And dated?

A. 5th and 12th, '56.

Q. And those signatures on that number four, "D. H. Turner, 5-12-56," when was that put on there, in McAllen or after you got it down here?

A. No, in McAllen, the time I picked it up.

Q. And up here, the other signature, "Carl H. Judin, 5-12-56," where was that put on?

A. The same date, the same place.

Q. The Max Lutz shed?

A. Yes, sir.

Q. Now, then, this box, the seals—the original seals on it were red tape, were they not, yellow on the sides?

A. Yes, sir.

Q. Those red seals are now broken?

A. Yes, sir.

Q. Were they broken at the time you picked them up up there?

A. No, sir, I broke them myself.

Q. And then across the top is a reseal, "D. H. Turner;" who put that on there?

A. I did.

Q. The bottom, those are the nails you were speaking of?

A. Yes, sir.

Q. Carton nails?

A. The bottom of it is sealed, or not mine, both of them.

Q. The bottom was held together with carton nails?

A. Yes, sir.

Q. Now, this other, larger carton, is the same thing true about whether Carl Judin's signature was put on it, and your signature on it?

A. Yes, sir.

Q. That was done at McAllen, initially?

A. Yes, sir.

Q. And the red seal is now broken on this large carton?

A. Yes, sir.

Q. Was that the condition it was in when you picked it up at McAllen?

A. No, sir, I opened it myself.

Q. And it is now sealed with an ordinary—I don't know what color you call that. What color do you call that reseal tape?

A. Brown, I suppose.

Q. Brown tape. Who put that on there?

A. I did.

Q. "D. H. Turner, reseal."

A. Yes, sir.

Q. Are those fair examples of the condition in which you found all of them?

A. Yes, sir.

Q. You still have the entire twenty three cartons in your possession?

A. Yes, sir.

Q. And at my request, you brought an example of each size down here today?

A. Yes, sir.

Mr. Wagner:

I think that's all.

Mr. Abbott:

Let's put it over here and have them mark it.

(Whereupon Plaintiff's Exhibit No. 8 was marked for identification.)

Re-Cross Examination.

By Mr. Abbott:

Q. Mr. Turner, I would like for you to examine this box and tell me if it appears substantially the same as the boxes that you opened for—that came from Max Lutz' shed?

A. Much the same manner, but the tape here is far from being as smooth. I don't believe the bottom of the other stuck out as much as this.

Q. Of all twenty three other boxes?

A. Yes, sir.

Q. I hand you another one. Bring the other box up, please, sir.

A. The ones I had were sealed, I believe, across, on the bottom, tacked here and here and here. This one is sealed quite similar on the bottom.

Q. You see no distinction between this box and the boxes you examined at Max Lutz'?

A. Just a moment. Yes, sir, I see one, two. Those seals were put in, I would say, after the box was sealed.

Q. Sir?

A. These seals could have been put in afterwards. I don't know. That is problematical. There is some similarity in the paper itself.

Q. You see no—comparing this box to the twenty boxes that you have examined, you see no particular distinction?

A. Not except on those several staples in the bottom, somewhat different.

The Court:

When you say "this box," you are referring to—

The Clerk:

D-9.

(Whereupon Plaintiff's Exhibit No. 9 was marked for identification.)

The Court:

Plaintiff's 9.

Q. D-9. Now, these boxes are distinct from the other boxes in what respect, if any, that you have noted? I want you to explain to the jury what you mean.

A. The only difference is the bottom seems to be somewhat loose and possibly the paper on one or two of the corners might have been—

Q. Let me ask you if it is a sealed box or not?

A. Sir?

Q. Is this a sealed box?

A. It is at present.

Q. Now, if someone delivered that box to you and wanted it counted, would you make a statement of what you found in there?

A. Yes, sir.

Q. And would you make it with the idea in mind that it was a box that came in that condition from the original shipper, or at least as far as you knew?

A. As far as I knew.

Q. Do you see anything on this box to indicate how many bags are supposed to be in it?

A. Yes, sir, it is stamped "2M." It is underneath the tape.

Q. All right, sir, you may take it off.

A. (Tearing tape.)

Q. Now, this box is supposed to contain two thousand bags?

A. That is the ordinary marker, 2M, would be understandable as two thousand.

Q. All right, sir. Now, you see no distinction between the way these boxes appear and the way I have had plaintiff's Exhibits 8 and 9 appear?

A. The difference in the staples underneath, there is considerable difference in those.

Q. When you say considerable difference what do you mean, sir?

A. Because they are not as well sealed.

Q. They are not as well sealed?

A. No.

Q. Do you know the status of the staples on all twenty three boxes that you have?

A. No, I couldn't—

Q. So these are only samples and not illustrative of the whole shipment, are they?

A. I would say they are illustrative of the entire shipment, the entire lot I saw.

Q. And yet you don't know about the rest of them, do you?

A. The rest of which?

Q. Of the boxes, of the twenty three boxes that you have, you don't know just how they are sealed?

A. They are sealed, I would say like that one, maybe not exactly. I looked at them, not that carefully, but I believe the bottoms were sealed and stapled according to that one.

Q. You believe they are. Would you bring them in, sir, and let us see them?

A. I am afraid they are in Harlingen, I would have to bring them up later.

Q. Could you do that this evening?

A. It would be two hours.

Q. Well, I want you to state either that you don't know or that you do know whether they are sealed in the same way, all of them, and if not, I would like for you to present them.

A. They are sealed according to the bottom of that one and this one. I checked that very carefully. It might not be as many staples, but they are better sealed.

Q. But they are sealed?

A. Yes, sir.

Q. Do you have any memorandum of that in the report that you made here as to the seal?

A. I believe I have on there that—have to look and see—appearance on the things when I picked them up, because there were one or two boxes that did appear to possibly have been tampered with.

Q. Appeared to have been tampered with?

A. They had been opened, two of them, figures, and one of them, the seal was broken on. I believe the only reference I have—not on this, but was in the affidavit I signed in Mr. Judin's office in McAllen.

Q. You have nothing in your file at this time to indicate—

A. No, sir.

Q. —the status of the staples that you are now talking about?

A. No, sir.

Q. So you don't know and cannot testify at this time as to how they are stapled, with any certainty, because you made no affidavit to it?

A. I can't make no statement as to the amount of staples, but they were stapled securely across, and across the corners, all of them.

Q. Now, is it your thought, sir, that these bags that you have from Mr. Lutz are impregnable?

A. I wouldn't know about impregnable, but I don't believe—

Q. Insofar as they are sealed sufficiently that there could be no tampering with them without your knowledge?

A. No apparent—

Mr. Abbott:

Your Honor please, I would move to strike all of this witness' testimony until all of the boxes of which he claims to have knowledge are presented and testified to.

The Court:

I overrule the motion and let you argue that—those things to the jury.

Mr. Wagner:

I say, I have no objection to having them all brought in, if it won't delay us. It would be expensive to go up there and bring them all down here, but if counsel wants them and will pay for it, why, we will try to get them down here.

Mr. Abbott:
I assume no obligation to pay for them, Your Honor.

The Court:
I don't think it is a question of him paying for it. I think that they should have been brought in here.

Mr. Abbott:
I have no further questions.

The Court:
All right.

Mr. Wagner:
Do you all want these two boxes kept here? I would like for them to remain in Mr. Turner's possession. I am not—

Mr. York:
I thought they had been introduced in evidence.

The Court:
Which two boxes?

Mr. Wagner:
The two boxes that Mr. Turner counted and he brought here as an example to show the way the boxes were.

The Court:
I am going to keep them here 'til the case is over. They have been introduced in evidence. They can be returned later, after the case is disposed of.

Mr. Wagner:

All right, thank you, Mr. Turner.

(Whereupon Defendant's Exhibits Nos. 10 and 11 were read to the jury by Mr. Wagner.)

Mr. Wagner:

Would you recall Tom Blackwell for a few questions?

TOM BLACKWELL, a witness who had heretofore testified herein, was recalled and testified as follows:

Direct Examination.

By Mr. Wagner:

Q. Mr. Blackwell, you are the Vahlsing bookkeeper that has testified here—

A. Yes, sir.

Q. —a little bit ago? Did you have any occasion to count any boxes of Roto-Lith bags?

A. Yes, sir.

Q. What was the occasion for you counting them?

A. Well, when the large shortage showed up for the second consecutive month, why, Mr. Burns, our manager, and Mr. Pfaffenroth, out of the New York office, were after my neck, so I was doing anything I could to try to find it, and the suggestion came up to weigh boxes. so we started in weighing boxes, and when I found variations in weights, I called the New Your office and Mr. Pfaffenroth contacted some of the various suppliers and gave me weights on what a box of twenty five hundred from this supplier should weigh, what it should weigh from another one. It came

in on the teletype to me first and was later confirmed in a letter, and so I had weighed enough boxes after—from various suppliers, after receiving this information, and I found out that the shortage was in Roto-Lith's boxes.

Q. You mean the weight, now?

A. The weight shortage was there. I found boxes that were supposed to weigh twelve pounds that weighed as low as eight, and so I picked out three boxes of radish bags and I counted those things and I found one box that was 497 short out of 2,500. I found another one that was 405 and one that was 380. Now, about the same time, why, Mr. Burns and Mrs. Stewart also counted some boxes.

Q. Now, don't tell what they found, sir.

A. Well, they counted another type.

Q. I see.

A. And as soon as I found this out, why, I wrote to New York and told them that we definitely know that our shortage—

Mr. York:
If the Court please,—

Q. That's all right, don't say that.

The Court:
All right.

Mr. York:
Unresponsive, no question, he is just talking.

Q. Now, of course 490 something out of a 2500. count box, that is a what, about a fourth?

A. Well, no, it would run you almost a fifth.

Q. Almost 20%?

A. Uh huh.

Q. Now, of course you were picking the light boxes to count, weren't you?

A. That's right.

Q. Because you were trying to find where your inventory shortage was coming from?

A. That's right.

Mr. Wagner:

I think that's all.

Cross Examination.

By Mr. Abbott:

Q. Now, Mr. Blackwell, you are simply the auditor for F. H. Vahlsing, Incorporated, aren't you?

A. That's right

Q Do you work in the plant?

A. At that time, the packing shed was in the same building. Right now, it is not.

Q. At that time, did you have your office out in the shed?

A. I had it at one end of the shed. The weighing—the trucks that came in were weighed through the office that I was in.

Q. Were you in an enclosed place there or are you out in the open shed?

A. I am in an enclosed place.

Q. And you were at that time?

A. Yes, sir.

Q. And when these shipments would come in of bags, you didn't actually control them yourself?

A. I did some of them, yes, sir.

Q. You were the auditor?

A. No, we have a man, Maurice Burdette, that did the bulk of the receiving, but sometimes he would ask me to receive a load for him, and most of those, when they were received, were stored in a building across the street from our packing shed, the one that we call the seed house, it is just a storage building, and I received several loads. I had other boys stacking them out, and as soon as they would get them stacked, I would count them.

Q. There were a great number of loads that came in from time to time over that year?

A. Quite a few loads, yes, sir.

Q. And you received several loads?

A. Several of them.

Q. Now, my inquiry goes to the point that you worked in an office distinct and apart from the bags, didn't you?

A. Yes, sir.

Q. They weren't stored in the office with you?

A. No, sir.

Q. You make no representation that some of these bags could not have been stolen, or boxes of them?

A. I wouldn't think so. I don't know how anybody—

Q. That isn't the question. You just make no representation that that could not have happened?

A. No, sir.

Q. Because you don't know?

A. I don't know.

Q. You didn't have the custody and care of them—

A. No, sir.

Q. —exclusively?

A. That's right.

Q. So any thought you have is based upon some records that shows up a shortage, but you don't know positively what occasions that, do you?

A. Well, I know that the boxes I counted were short.

Q. I am sure they were, sir. I just say that you don't know positively what the entire shortage was caused by, do you?

A. It is my opinion it was shortage in the count.

Q. I didn't ask you for your opinion, Mr. Blackwell. Do you want to volunteer more information?

A. No, sir.

Mr. Abbott:

I have no further questions.

Re-Direct Examination.

By Mr. Wagner:

Q. Was there any printing on these bags?

A. On the bags?

Q. Yes.

A. Yes, sir, those were all printed bags, they had the—at that time, all of our bags would tell whether they were radishes, carrots, or what they were.

Q. Well, could any shipper use them?

A. I wouldn't think so. They had our own company's name on them.

Q. That's what I am getting at.

A. Yes, sir.

Q. They were printed up for Vahlsing Company?

A. F. H. Vahlsing, Incorporated, yes, sir.

Mr. Wagner:

That's all. Thank you.

The Court:

All right, you will be excused.

Mr. Wagner:
Call Mr. Bobbie Burns for a few questions.

Mr. Abbott:
Your Honor please, we made the same objection to this witness as we have to the other four, that he was not indicated to the plaintiff that he would be a witness in the case. This is the fifth one.

Mr. Wagner:
Again I make the same point, Your Honor, that I served a reply to this request to name all our witnesses—I don't know what the date of it was, but it must have been about May the 10th, or thereabouts,—wasn' that right?

Mr. Abbott:
Yes, sir.

Mr. Wagner:
—at which time I didn't know that Mr. Burns knew a thing in the world about this thing. In fact, I didn't know that until here just—today, I think.

The Court:
Well, you have used several witnesses so far and this is the fourth one that—

Mr. York:
May I say the fifth one, Your Honor?

The Court:
—that was not included in your list, counsel.

Mr. Wagner:
That's correct, sir.

The Court:
How many more are you going to use that were not included in your list?

Mr. Wagner:
Well, Fred Meyer, I think he is on there, I am pretty sure. Is Vahlsing Junior on there?

Mr. York:
Seventeen names were given us to be relied—

The Court:
What?

Mr. York:
Seventeen names.

Mr. Abbott:
Were given as to be relied on, but not these five that we have objected to.

The Court:
Well, I am not going to hold him strictly to it this time, but hereafter, I want to be sure that the names of all possible witnesses are served in response to these interrogatories. I will let you go ahead with him.

R. O. BURNS, having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Wagner:

Q. What is your name?

A. R. O. Burns.

Q. Where do you live, Mr. Burns?

A. Mercedes, Texas.

Q. By whom are you employed?

A. F. H. Vahlsing, Incorporated.

Q. In what capacity?

A. General manager.

Q. For how long?

A. Five years.

Q. You were with them, then, in the early part of 1954?

A. 1954, yes, sir.

Q. Do you remember a discussion of an inventory shortage that came up in the early part of '54?

A. I do.

Q. Because of that discussion did you have occasion to do anything with reference to boxes of incoming polyethylene bags?

A. I did.

Q. What did you do?

A. I—

Mr. York:

Please the Court, we have our running objection to all this testimony—

The Court:

Yes, sir.

Mr. York:

—on an issue that we don't think is included in the—

The Court:

Yes, sir.

Q. You may answer the question.

A. Will you repeat the question, please?

The Court:

What did you do about it? You said you had some discussion about shortages. The question now is, "What did you do about it?"

A. I had the bags counted and I counted some of them myself.

Q. Do you recall about when that was?

A. It was in the proximity of the latter part of April.

Q. Of 1954?

A. 1954.

Q. What did you discover on the boxes that you counted yourself?

A. I found a consistent shortage.

Mr. York:

If the Court please, we object to the conclusion of the witness about it.

The Court:

Yes, I will strike the—I will strike the answer. What did you find?

A. You mean the number of shortage?

The Court:

Yes. Let us judge whether it was consistent or not. Let the jury judge that.

A. The boxes ranged from 50 to 300, or a little better, short.

Q. Short?

A. Yes, sir, short of the markings on the box.

Q. Do you recall what—those bags, different kinds of them, come in different quantities, don't they?

A. Yes.

Q. I mean some of them are two thousand, some of them twenty five hundred?

A. These were all marked fifteen hundred.

Q. Fiften hundred?

A. Yes, sir.

Q. And they would run from fifty to two hundred short?

A. Three hundred or a little better than three hundred.

Q. Oh, even more than that?

A. I think, if my memory serves me right, on one occasion, three twenty two.

Q. And the boxes that you examined, were they boxes that had already been opened or what was the condition—what was their condition when you counted them?

A. They were sealed when they were brought to my office. I opened them personally, in the presence of a secretary, and the secretary and I counted them individually and together.

Q. Do you have any recollection about approximately how many boxes you counted?

A. I counted—individually, I counted three boxes, and the sec—

Q. Now, don't tell us what other people counted—

A. Okay.

Q. —and told you about.

A. Yes.

Mr. Wagner:
That's all.

Cross Examination.

By Mr. York:

Q. What was the shortage on the other two boxes you counted?

A. One was—I don't remember the exact count on the other two, and the reason I remember the one with the large—

Mr. York:
That's all right, sir. That's all right. You may be excused, as far as I am concerned.

The Court:
Are you through?

Mr. Wagner:
I am through.

The Court:
You are excused.

Mr. Wagner:
Would you have Mr. Eliason come in, Victor Eliason?

VICTOR ELIASON, having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Wagner:

Q. State your name for the record, please, sir.

A. Victor Eliason.

Q. By whom are you employed?

Mr. York:

Pardon me. If the Court please, this is number six or seven who is not on this list.

The Court:

It is the sixth one.

Mr. York:

Sixth one.

The Court:

Sixth one not on the list. Is this another employee of Vahlsing's?

Mr. Wagner:

Yes, Your Honor. I didn't know until I was up there getting this case together that this man was a witness to anything. They served this notice on me when I was in the trial of another case and I hadn't gone to work to prepare this case for trial yet.

The Court:

All right, go ahead.

Q. By whom are you employed, Mr. Eliason?

A. By Texas Plastics, Mr. Vahlsing.

Q. How long have you been employed by that concern?

A. Approximately two years.

Q. Let's see. That would take us back to where?

A. Takes us back around the middle of April.

Q. Of what year?

A. '54.

Q. '54. Do you have a business or a trade or profession?

A. I am a printer by trade.

Q. Had you been working for other printing companies before coming to work for Mr. Vahlsing's company?

A. Yes, I worked in Des Moines, Iowa, for a printing concern, and I also worked for Alamo Plastics, in Alamo, Texas.

Q. Now, you say in about April of '54 was when you went to work for Mr. Vahlsing?

A. Yes, sir.

Q. Do you hold a position with Texas Plastics?

A. I am assistant manager.

Q. And who is the manager?

A. Mr. Fred Meyer.

Q. Did you have anything to do with putting the Texas Plastics plant in operation in Elsa?

A. Yes, I was the first man to start the plant in Elsa. I was with it from the very beginning, before they even had any equipment.

Q. What part of the plant machinery first arrived at Elsa?

A. There was two Simplex four seven bag machines that came down first.

The Reporter:
Did you say "four seven"?

A. That is a model number, four seven.
Q. And were those bag machines put in operation—perhaps we had better explain this. I don't know that it has been explained to the jury. What is the first operation that Texas Plastics does right now?
A. Well, we make the film.
Q. You make the film?
A. Yes.
Q. In what form does the material come in there to be manufactured?
A. Well, it comes in the form of a pellet, or resin, as it is sometimes called, or plate.

The Reporter:
What was the first word you used?

A. Pellet.
Q. Sort of looks like caliche gravel, doesn't it?
A. Similar.
Q. All right. And the first thing you do is what you call the extrusion process, isn't it?
A. Yes, that comes out of a machine called the extruder, the melted pellets, and it is made into film such as you see here.
Q. This bag here, is that the stuff that comes in there?
A. Yes, it comes in a fifty pound bag, made into pellets similar to this.
Q. All right, it is first treated in the extruder and it comes out in plain film like that, is that rght?
A. That's right.
Q. And then what is the next process?

A. It is treated in a treater. That is a process that a film has to go through in order to be receptive to ink.

Q. When it first comes out, it is slick and it won't print is that right?

A. It won't—it will print, but the ink will flake off.

Q. And so it goes through a treater so it will take ink?

A. That's right.

Q. And what is the next process that it goes through?

A. Well, our next process then is printing.

Q. Now, in printing, do you print a whole line of this stuff?

A. It is printed in rolls.

Q. A roll, I mean.

A. It is a roll printing process.

Q. When it goes into the printer, it is on a roll like this one, or much larger, is that right?

A. Goes in as a roll and comes out as a roll.

The Court:

Now, this is all very interesting, but what has it got to do about this libel, or this slander?

Mr. Wagner:

Oh, I don't know, Your Honor. I just thought it was interesting. It was to me.

The Court:

Well, I have got other things to do. I don't understand it. I would like to see it, but I don't understand it after it is over. I do understand that when a man comes in and says somebody charged him with being a crook, that that is an issue in the case, and

how much damage—if he did, and if it was false. Now, let's get down to that issue.

Q. Now, Mr. Eliason, I will hand you three Roto-Lith invoices that have been marked D-3, 4 and 6, in evidence in this case, and—first let me ask you about that tablet that I handed you there. Are those part of the original records of your plant that you let me bring down here to photostat?

A. Yes, these are the converting records for some printed rolls that we received from Roto-Lith Corporation.

Q. Now, those—converter records, is that what you call them?

A. Or a bag making record.

Q. Is that the record that shows how many bags were made from those particular rolls?

A. Shows the record of the bags that were made and also shows the record of the weight received, as we were invoiced, invoiced for them.

Q. Now, with reference to those three invoices that I handed you, do those converter records have any connection with those three invoices?

Mr. York:

If he is going to testify about that, could I take him on voir dire as to how he got these records?

Mr. Wagner:

Sure.

The Court:

Well, I don't think it is ripe for that yet.

Mr. York:

He hasn't asked the question, Your Honor, but I thought he was going to testify from them.

Mr. Wagner:

Well, I will go into that a little more with him if you want me to. Let me have those invoices back for a moment. You keep your converter record.

Q. What is shown on the first sheet of that converter record that you have there?

A. This refers to what we term as the first shipment of rolls that he sent us.

(Conference between counsel, out of hearing of the reporter.)

Mr. Wagner:

The first sheet has nothing to do with what I am trying to get to.

Q. What is the second sheet?

A. The second sheet refers to some invoices concerning a second shipment that was received, of printed rolls.

Q. And does that show the gross weight of those rolls of film as they were received at the Texas Plastics plant?

A. Yes, it does.

Q. Each roll?

A. Shows each roll.

Q. What does it show besides gross weight?

A. It also shows the weight at which we—this here served as a receiving report for us, we checked the weight of his rolls with our weight as we received them; we weighed each box, took the roll out of the box and weighed each roll and counted them together.

Q. And what is the third column?

A. Well, there were a number of different figures. We were trying to make the invoices agree with the

receiving reports and so we took every possible figure that we possibly could, because there seemed to be a discrepancy in the records as they were invoiced to us from Roto-Lith, so in order to—

Q. All right, what is the third column?

A. The third column was some figures that were penciled on the boxes.

Q. Did all the boxes have figures penciled on them?

A. No, not all of them.

Q. And those figures were apparently weight, were they not?

A. They apparently were weight, but we finally assumed that the boxes the rolls were sent in that the boxes themselves were made by a commercial film maker, and s[illegible]e assumed that those figures didn't have any rela[illegible]on to the rolls, although we took them down.

Q. Now, with those weights that are shown there on that check sheet, were they made and recorded right at the time that the rolls were first received there?

A. Yes, we weighed them and recorded them before we ran the bags.

Q. Now, each of those—

Mr. York:

Beg your pardon. He hasn't—I would like to take him on voir dire and find out whether he made this—

Mr. Wagner:

All right

Mr. York:

—or what it is, if the Court please.

Mr. Wagner:
All right, go ahead.

Voir Dire Examination.

By Mr. York:
Q. Did you put those figures in there yourself?
A. Yes, this is my own handwriting.
Q. You did all of this operation that you have been telling us about?
A. I was there. I was supervising the operation.
Q. Well, when you say you were supervising, what do you mean you were supervising?
A. Well, I had two boys as operators and I was working with them, helping keep the machines in adjustment.
Q. The machines?
A. Yes, sir. We were making the bags from these rolls.
Q. What were the boys doing?
A. They were operating the machines, taking the bags, putting them in—
Q. They weren't putting any of these figures on the sheet here?
A. Not on this particular sheet, no, these are my own figures.
Q. You put all the figures on there and you did all of the operations that those figures are supposed to represent?
A. I did it, with the two boys.

The Court:
Did you do it at that time or is that a later thing that you have worked up?

A. This was done right at the time.

Q. You made up that sheet there right at the time,—

A. Yes, sir.

Q. —that you have in your hand?

A. Yes, sir.

Q. When did you make it?

A. Right at the time.

Q. When?

A. Before we ran the bags.

Q. When was that, please, sir, approximately?

A. It was approximately the first of May.

Q. Of what year?

A. '54.

Mr. York:

All right.

Direct Examination (Continued).

By Mr. Wagner:

Q. Now, each one of those boxes has a weight somewhere in the neighborhood of sixty pounds. Is that one or more rolls?

A. The majority of the rolls—

Q. No, what I mean is is sixty pounds about what a roll weighs?

A. No, each box had two rolls in it.

Q. That's what I want. All right. Now, then, what is the third sheet?

A. Well, sir, the third sheet is merely a recopy of what was on the second sheet.

Q. It is a clean draft, isn't it?

A. That's right.

Q. Sheet No. 2 that we have been talking about, that is what was made right there?

A. That was the work sheet.

Q. And then a clean—it is the same information on the third sheet, it is the receiving weights, is it not?

A. Yes.

Q. All right. Now, then, let's get to the fourth sheet. Now, the information of the fourth sheet, in a general way, what does that show?

A. It shows the gross weight and the starting and finishing time of the roll and also the number of bags per roll as shown by the counter. It also gives the date.

Mr. Abbott:
May I look over his shoulder, Your Honor,—

The Court:
All right.

Mr. Wagner:
Sure.

Mr. Abbott:
—and see if I can understand this?

Q. Now that, the sheets we are now talking about, are the records pertaining to the production of corn bags, are they not?

A. Yes.

Q. And what date did that production start? Perhaps—let me ask these questions now. You have said that those receiving weights, you wrote those down yourself?

A. Yes.

Q. Now, the figures on this sheet, however, who actually wrote those figures down there?

A. These were the operator's.

Q. Up near the top of the sheet, does it show the name of the operator?

A. Yes, it says Jero here, J-e-r-o.

Q. And on this sheet, he recorded the date on which he ran each particular roll, did he not?

A. That's right.

Q. And the gross weight of the roll?

A. Yes.

Q. And he stated the time on which he started running the particular roll?

A. Yes.

Q. And he recorded the counter reading at the time he started each of these rolls?

A. Yes.

Q. Now, perhaps I had better—you had better explain to the jury what you mean by this counter business. At the end of each machine, there is an electrical device that counts the bags as they are completed on the machine, is there not?

A. Yes, that's the way they are in our plant.

Q. And the start counter, that means when he started on the roll, what the counter marked?

A. Yes.

Q. And then the next thing he recorded is what the counter read when he finished that roll, is that right?

A. Yes, that's right.

Q. And then, in the last column, is the total number of bags from that particular roll?

A. Yes.

Q. Now, are all the corn bags on this page or—no, there are some corn bags on the second sheet, too, are there not?

A. Yes, this is for machine number 1. The second page is for machine number 2, run by Elas, another operator.

Q. Now, these records show that from May 28th—on machine number 1, now,—machine number 1 was working—May the 28th was the first day on these corn bags, wasn't it, and it runs on down to about June the 4th? I think is that right.

A. Ends June the 3rd.

Q. June the 3rd. Isn't there the last roll on June the 4th?

A. There are some six by thirteen inch bags.

Q. Oh, that is different bags?

A. Yes.

Q. Oh, yes. That's right, it is, isn't it? All right. Now, machine number 2 was producing corn bags from May the 29th up to what day?

A. The 3rd of June.

Q. And each roll that was run, it was recorded there how many bags came off of that roll, was it not?

A. Yes.

Q. Now, those two sheets pertain to corn bags, do they not?

(No answer heard.)

Q. Now, have you summarized or—you know, worked up the figures that are disclosed by those working records, by those original records there, about those corn bags?

A. Yes, I did that approximately the same time, after they finished running them, why, I made another converter record.

Q. Now, how many rolls of those corn bags were made there?

A. Twenty four rolls?

Q. And how many pounds?

A. Well, the weight that was invoiced was seven hundred and seventy two pounds.

Q. All right. Now wait just a minute. Now, D-4 is a Roto-Lith invoice for what?

A. That is for seven hundred and seventy two pounds in rolls, equivalent to one hundred and twenty nine thousand bags.

Q. And those one hundred and twenty nine thousand bags were invoiced at so much per thousand bags?

A. Yes.

Q. And the invoice for one hundred and twenty nine thousand, how many bags did you actually produce from those twenty four rolls?

A. We actually produced one hundred and nineteen thousand nine hundred and seventy five, or, in round figures, 120,000.

Q. Nine thousand and something short, then, below the invoice?

A. Yes.

Q. The invoice calls for a weight of seven hundred and seventy two and a fraction pounds, and how much did you discover those rolls for making corn bags actually weighed?

A. Well, our receiving records showed seven hundred and fifty four pounds.

Q. That is about what, eighteen pounds short?

A. Yes, approximately.

Q. Now, then, in working those rolls, however, you have a certain amount of scrap, do you not?

A. Yes, we do.

Q. What does the scrap consist of?

A. Well, it consists of starting the machine, or if there are imperfections in the film, or some misadjustment in the machine.

Q. And did you preserve the scrap from each one of these rolls and record the weight of the scrap?

A. Yes, we always do that.

Q. And do those converter records on each roll show how much scrap there was?

A. Yes, they do.

The Court:

He is waiting for your question, I guess. I don't know.

Mr. Wagner:

Sir?

The Court:

He said they did show the—how much scrap there was. I guess he is waiting for your question now.

Mr. Wagner:

Oh, yes.

Q. Well, how much scrap did you have from those rolls for making corn bags?

A. Fourteen pounds and one—14.1 pounds.

Q. All right. Now so much for the corn bags. Now, then, I will show you another invoice—

The Court:

Wait a minute. How much was the shortage in pounds, now, the total that you just gave us, 18 pounds?

A. Yes.

The Court:
And you found 14 pounds of it made up in the scrap?

A. Repeat that, please.

The Court:
You had 18 pounds shortage,—

A. Yes, sir.

The Court:
—total?

A. Yes.

The Court:
And then you found 14 pounds scrap?

A. That's right.

The Court:
Now, is that 14 pounds—

A. Now, the scrap, this counter ran consecutively through the whole day regardless of whether there was scrap or not, every time the bag machine made a bag, whether it was good or bad, this total count that we have here is the count with the scrap, nine thousand bags, whether there was scrap or not.

The Court:
You mean you didn't have any scrap or—

A. We weighed the scrap, as a matter of course, but the counter shows all bags, whether they were

good bags or bad bags. In other words, if they were bad bags, they were sorted out.

Q. No, wait a minute. You missed the point. You missed the point, Mr.—

The Court:

Now, I will finish my point.

Q. Yes, that's what I—

The Court:

You mean you didn't have any scrap except in some bag?

A. We had scrap, yes.

The Court:

Well, that's what I thought. I—I am just trying to get my own mind clear now. I thought you said you had 18 pounds shortage.

A. That is the weight overcharged, yes.

The Court:

And you had 14 pounds of scrap?

A. Yes, sir.

The Court:

Now, is that included in the 18 pound shortage?

A. Yes, the scrap is included in the shortage.

The Court.

Well, would that leave a net of four pounds shortage?

A. Well, this shortage was only on the receiving report. In other words, the weight invoiced was checked with the rolls as they came into the plant, we weighed them, and so the 18 pounds was actually irrespective of the scrap.

The Court:
All right.

Mr. Wagner:
Your Honor, I might state this with reference to that, the weight is—

The Court:
I am clear.

Mr. Wagner:
The invoice is based on per thousand bags, it is not based on weight, and the number of bags short in the roll was nine thousand bags, wasn't it?

A. Yes, that's right.

Q. Now, then, I will hand you an invoice of Roto-Lith's marked D-6, says "124 pounds in rolls, equivalent to 14,500 bags, potato bags." Do you have a record of the receipt of those rolls?

A. Yes, I have it as invoice No. 3951 and the weight invoiced—

Q. Just a minute. That is the same number, is it not?

A. Yes.

Q. 3951. The weight invoiced was one hundred and fifty four pounds?

A. That's right.

Q. And your check—your receiving weights was how much?

A. 122.3 pounds.

Q. So it is one and a fraction pounds less than what is stated on the invoice?

A. Yes.

Mr. Wagner:

But again, Your Honor, I don't want to confuse the Court. The weight is unimportant. The price was based on the numbers of bags.

The Court:

I understood that.

Q. Now, then, how many bags were produced from those rolls, how many potato bags were produced?

A. 13,489.

Q. And how many pounds of scrap did you have from those rolls of potato bags.

A. Our record showed 5.4 pounds.

Q. Now I will hand you another invoice marked D-3, which calls for 3,262.3 pounds, in rolls, equivalent to 421,000 carrot bags. Do you have a record of the receipt of the rolls called for in this invoice?

A. Yes.

Q. Insofar as the receiving weights are concerned, how do they compare with that weight?

A. They were short about 179 pounds.

Q. Now, with reference to the number of bags called for on the invoice, 421,000, how many bags were actually produced?

A. 383,598.

Q. How many short is that, approximately?

A. 37,000.

Q. How many pounds of scrap did you have from working those rolls?

A. 31.5.

Q. Another figure here, I don't know how this fits in, but while I have you on the stand, how many rolls were there of that—of those potato bags we spoke of a while ago?

A. Four rolls.

Q. How many rolls were there of the corn bags that we spoke of?

A. 102.

Q. Corn bags?

A. Wait a minute. Corn bags, twenty four.

Q. How many rolls of the carrot bags?

A. 102 rolls.

Q. Now, if I understood your explanation to the Judge about this spoiled bags going into scrap, was that even though the bags got spoiled, they are included in your count of the total number of bags made?

A. That's right.

Q. And they are also included in your scrap figure?

A. The counter was never changed from the start of the day to the end of the day, we ran clear through the day, and then this total that is on here represents that day's production.

Q. Uh huh.

A. Good bags or bad bags.

Mr. Wagner:

I think that's all.

Cross Examination.

By Mr. Abbott:

Q. Mr. Eliason, how long have you been in the printing business?

A. Well, counting my term with Texas Plastics, around fifteen years.

Q. Around fifteen years. Did you ever have any experience with Kraft paper?

A. No.

Q. Never have bought any?

A. Kraft as boxes, you mean?

Q. Well, they have rolls of Kraft paper, you know, that come out of the plant and are shipped.

A. Yes, for wrapping purposes.

Q. For wrapping purposes. Did you ever check the weights on that?

A. No.

Q. Do you know whether or not it is the experience in the Kraft industry that as soon as a roll of Kraft paper comes out of the—it is a mulch to begin with, you know, and then as it comes out of the roll, it is still damp and they put it on the end down there and weigh it and that is the way it is sold out and it can go down as much as 10% by the time it reaches the consumer?

A. I have never weighed any.

Q. It is just of passing interest at this moment. Now, what you are saying, in effect, if I understand your testimony, is that we have invoiced you for a certain number of bags on an invoice,—

A. That's right.

Q. —and that as it turned out, you didn't get that number of bags?

A. We were not able to make that many bags.

Q. You were not able to produce that many bags out of the roll stock that we provided, isn't that correct?

A. That's right.

Q. Now, we invoiced you on the basis of bags on the out-turn of so many thousand bags per ten pounds, didn't we?

A. Well, the invoice did give the weight and it also gave the number of bags that were supposed to be produced from that.

Q. Now, do you know what actually happened in regard to these invoices and many others? Do you know, for example, that we had printed, in roll form, a lot of rolls for the Vahlsing Corporation, and that is what you are talking about, isn't that correct?

A. That's correct.

Q. And rather than to have Roto-Lith convert that from roll form into the bags, it was requested that they be sent down to Elsa to let you do it, isn't that right?

A. That's right.

Q. You just purchased the printed roll, didn't you?

A. Well, that's what the invoice says.

Q. Well, the invoice reads, for example, on No. 3969 "772.3 pounds in rolls, equivalent to 129,000 bags."

A. Yes.

Q. Now, as a matter of fact, the reason that they made that conversion from rolls into bags was so that they could give you an allowance for the bag making that you did, wasn't it?

A. Well, I presume that. I am not acquainted with the bookkeeping end of it.

Q. All right, sir. You see on here where it says "Less bag making, $4.00 per thousand," don't you?

A. Yes, sir.

Q. So that is the reason that it was converted from rolls into bags, so that you could make the bags and you would have an allowance for your making the bags?

A. Well, it was to give us experience too.

Q. Right.

The Court:
And what, give you the experience?

A. Well, we were to—

The Court:
I am just asking you—I am just—is that what you said?

A. Well, we were to have something to do while the plant was getting started up.

The Court:
I understand. I just didn't know whether I understood your answer and I repeated it and asked you if that was what you said, to give you the experience, is that correct?

A. Yes, it was to give us the experience while we were starting the plant.

The Court:
I believe I understand you now.

Q. Now, in talking about invoice No. 2000, that calls for this 772.3 pounds in rolls, you actually produced, out of that 120,000 bags, didn't you?
A. We produced approximately that, 119,979.
Q. That is pretty close to 120,000 bags. And all that we invoiced you for was 129,000 bags?
A. I don't have the invoice. I believe that's correct.
Q. Let me show it to you, sir, to refresh your memory.
A. Yes, 129,000.

Q. So what you are saying is that we were 9,000 bags short because you didn't come up with that many out of your bag making machinery?

A. Yes, not only that, but the weights were short, even—

Q. Well, on the 772 pounds, it turned out to be 18 pounds, didn't it?

A. Approximately, yes.

Q. And 124 pounds that we invoiced you for, you got 122.3?

A. Yes, sir.

Q. Now, is there any moisture in ink?

A. No, there shouldn't be.

Q. None whatsoever?

A. Not in that type of ink. Not in the type of inks used on flexographic printing. The solvents are alcohol, which evaporates.

Q. Now, when you apply ink to this roll, it adheres to it, doesn't it?

A. Yes, sir.

Q. And has to be dried?

A. Yes, sir.

Q. And the film itself has gone through a number of treatments before it is finally put into roll form, printed?

A. Yes, sir.

Q. Is it your statement that there is no moisture absorption that has taken place whatsoever between the time that it is produced right off of the printer and until the time you convert it into bag making, if that is as much as five or six months?

A. It is very negligible. Polyethylene does not absorb moisture. That, you can sya.

Q. All right, sir. and when you say negligible, if you had an invoice for 124 pounds and got 123.9, or

whatever it was, or 122.3, that is a great deal of difference, is it?

A. I don't believe you could tell—I don't believe you could say the amount of moisture that would be in that roll.

Q. What I am trying to say, sir, is there wasn't a great distinction, was there?

A. In what?

Q. In the amount that you were invoiced and what you actually received?

A. It—

Q. It amounted to less than 1%, didn't it?

A. I did not compile it percentagewise.

Q. Well, let's figure it out, then. 124 pounds invoiced, your scale says 122.3. That is a difference of 1.7, isn't it?

A. Yes, sir.

Q. And that is about 1%, isn't it?

A. It may be.

Q. Is that, in your mind, a serious shortage?

A. Well, it is a shortage, I wouldn't say how serious it is. If it cost a thousand dollars for one pound, I would say it would be a serious shortage.

Q. All right, sir, and this doesn't cost that much, does it?

A. It is invoiced for what, nine dollars a ton, nine fifty?

Q. That's right. How much difference did it make?

A. Well, the difference—we weren't invoiced by the pound, so I would say the difference was more than the invoices, they came by the thousands, the thousands of bags that they represent.

Q. That, as we have stated, the conversion of roll stock into bags was in order to give you an allowance for making your own bags, wasn't it, and you got an allowance of a dollar a thousand for that?

A. For bag making, yes.

Q. That's correct. So as it turns out, it is a negligible quantity, isn't it?

A. Well, it is not the same.

Q. All right. Now, getting down to the precise point, about you were supposed to get 120,000 bags out of this amount of poundage in the rolls, and you only got 120,000, and let's assume that the poundage was almost on the nose and you get less bags out of it, what would be the reason for it?

A. Well, if the poundage were identically the same, and the number of bags—there was no scrap—we didn't receive enough bags, either there was a short count or the film was heavy in guage.

Q. Now, the film could have been heavy in guage, couldn't it? Now, sir, when you say a film is heavy in guage, what you mean is that a film is designed to be double oh one five, or one and a half mill, as we refer to it here, if it is double oh one eight, then it is heavy in guage, isn't it?

A. Yes.

Q. And you cannot make—that three tenths of an inch on fifteen amounts to 20% difference in the complete out-turn, doesn't it?

A. Yes.

Q. So if you have film like this, if it is double oh one eight and you have ordered it double oh one five, you are just not going to be able to produce as many bags out of it, are you?

A. That's right.

Q. Now, on the other hand, if you had film that was double oh one two and you were supposed to have double oh one five, you would get more bags, in all probability, if you had exactly the same weight?

A. No,—yes, that's right.

Q. All right. You do extruding in your plant, do you not?

A. Yes.

Q. Do you happen to know what is good manufacturing tolerance in working to the ten thousandths of an inch, as you do in this?

A. Well, we keep it within three ten thousandths.

Q. Within three ten thousandths?

A. That is our standard.

Q. In other words, you mean that it is either double oh one eight or double oh one two, three ten thousandths either way?

A. No.

Q. All right, it would be one and a half on each side, is that correct?

A. That's right. That's right.

Q. Now, do you do that better than anyone else, or other manufacturers do have a three ten thousandths of an inch variance, don't they?

A. That's right.

Q. And you do it just a little bit better than they do?

A. Well, we try to.

Q. I am sure you do, sir. But my point is that all manufacturers, or most of them, do have that tolerance on manufacturing because you are working in minute figures, aren't you?

A. Well, they don't have to worry, they sell by the pound, so what do they care about your yield? You don't get so many bags, they still get their money because they are selling by the pound.

Q. All right, sir. Now, reducing it to what actually took place here, if we were to deliver you 124 pounds in rolls on our invoices, converted to so many thousands of bags, and you got 122.3 pounds when it

finally arrived at your dock in Elsa, Texas, and you got less bags than we had estimated on our invoice, then isn't it true, sir, that it could have been because and was because the guage of this polyethylene film was too heavy?

A. Well, there is another way to look at it.

Q. Just answer my question, sir.

A. If it was over guage, it is possible, yes.

Q. As a matter of fact, you made a complaint about that, didn't you?

A. About what, sir?

Q. About that you had film that was over guage, it was too heavy, and you were not getting the numbers of thousands out of the rolls that you were supposed to get.

A. Who did we make the complaint to?

Q. I asked you.

A. No, I do no know if there was a complaint.

Q. Do you know if any was made?

A. No, sir.

Q. You do not. Now, is it possible that such a complaint was made to Roto-Lith because you were not getting the production out of the rolls?

A. Well, I presume they were notified of the short count.

Q. Now, I don't want to argue the issue with you. You refer to it as a short count. What you really mean to say is that you didn't get the production out of the rolls that you thought you should get, or as our invoice said you would get, isn't that right?

A. That's right.

Q. So now you convert those words into short count?

A. Well, it is a short count, sir.

Q. It is also a heavy guage that just won't make that many bags?

A. Well,—

Q. It could be that?

A. I could not affirm that it was a heavy guage.

Q. Well, but you can't say that it wasn't?

A. Well, we can test the guage, if you want to, in the bags.

Q. I am trying to go back to this moment. You don't know, at that time, whether it was or wasn't, or whether a complaint was made on that basis?

A. No, sir, I don't.

Q. Now, did you, at any time, understand that Roto-Lith manufactured their own film?

A. No, sir, I do not believe that they did.

Q. What did you understand that they did do?

A. Well, I understood—

The Court:

Speak out.

A. I understood that they printed film and made bags.

Q. And that they purchased their film elsewhere?

A. Yes. I don't know for sure, I just presumed that.

Q. And you know nothing about a complaint made to Roto-Lith about heavy gauge film?

A. No, sir, I don't.

Q. And you know nothing about an $1,800.00 allowance being made to Vahlsing because of that?

A. No, sir, I don't.

Q. All right. And you know nothing about the Visking Corporation allowing that $1,800.00 to Roto-Lith because of that, do you?

A. No, sir, I don't.
Q. All right, sir.

Mr. Wagner:
Are you through?

Mr. Abbott:
Yes.

Re-Direct Examination.

By Mr. Wagner:
Q. There has been some suggestion here that maybe you just didn't get as many bags out of these rolls as you should have. When those rolls came in, were they already printed up with Vahlsing's name on them and just ready to be made into bags?
A. Yes.
Q. Is this an example of the way that stuff is when it comes in?
A. Yes, that's the way it comes in.
Q. In other words, it is already printed up, you couldn't have cut your bags too long and that way you wouldn't get enough, there is just so many bags on a roll, isn't that right?
A. Once the bag is printed, you cannot change the length of the bag.
Q. And these rolls that came in from Roto-Lith were already printed up, all you had done here was put it through the bag making machines?
A. That's right.

Mr. Wagner:
I think that's all.

Re-Cross Examination.

By Mr. Abbott:

Q. I believe that counsel misapprehended my point of inquiry to you, sir. I made no suggestion about cutting these things any shorter than the length suggested by the pre-printing on them. I am merely saying that a film of double oh one five thickness would produce less bags than a double oh one two thickness, and that was all that I am suggesting to you, and that is correct, isn't it?

A. Yes, sir.

Mr. Abbott:

I have no further questions.

The Court:

All right, you will be excused.

Mr. Wagner:

That's all.

Mr. Abbott:

May I get a drink of water, Your Honor?

Mr. Wagner:

Take the stand, Mr. Meyer.

The Court:

All right, you may proceed, counsel.

FRED J. MEYER, having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Wagner:

Q. What is your name?

A. Fred J. Meyer.

Q. Are you the manager of Texas Plastics, Inc., that we have been hearing about?

A. Yes, sir.

Q. Now, right here, while it is fresh in my mind, in everyone's mind, I want to ask you if you made some computations based upon the figures that this young man has testified to, in an effort to determine how much Vahlsing was short counted on these corn, carrots and potato rolls?

A. I did, sir.

Q. Is that the computation that you worked up?

A. Yes, sir.

Mr. York:

May it please the Court, we object to the conclusion of short count with this weight of these rolls being in question here. Didn't note any bags at all.

Mr. Wagner:

Well, it is, it is invoiced—

The Court:

I sustain the objection as to "short count." You made a computation of what you claimed was a shortage, is that correct?

A. No, we saw the invoices there, so we—

Mr. Wagner:
Now wait a minute, Mr. Meyer. Let's not argue with the Court.

A. Oh.

Mr. Wagner:
You don't have to explain it all, just answer the questions.

A. Yes, sir.

The Court:
We will just change it about the short count.

A. I'm sorry, sir.

Mr. Wagner:
I will withdraw that word, Your Honor.

The Court:
Show it as shortage.

Q. Now, let's go to the corn bags first. How many number of corn bags were invoiced on this D-4. 129,000, is that what you took for one of your figures?
A. Yes, sir.
Q. All right, and how many corn bags did you gather from this boy's records were produced from those rolls?
A. 120,000.
Q. The invoice called for 129,000 and he produced 120,000?
A. Yes, sir.

Q. But he also showed that in addition to those 120,000 bags, he had some scrap left over, did he not?

A. Yes, sir.

Q. Did you compute from 120,000, having come out of that weight rolls, how much the average weight per thousand was of that film?

A. Yes, sir, it was 6.16 pounds per thousand.

Q. 6.16 per thousand?

A. Yes, sir.

Q. And did you apply that figure against the scrap to see how many bags would have come out of the scrap if they had completed good bags with them?

A. I did, sir. It was two point three thousand.

Q. Now, incidentally, so the jury will understand this computation of yours, under that "bags equivalent to scrap" column, you have got "two point three."

A. Yes.

Q. What was that?

A. Two thousand three hundred.

Q. Two and three tenths, in other words?

A. Yes, sir.

Q. Two thousand three hundred. Now, you added this two thousand three hundred to the 120,000 good bags that he reported—

A. Right, sir.

Q. —as produced, and that would give you a total of how many bags as against the invoiced 129,000?

A. That would mean we had 1223 thousand bags.

Q. And what percentage is that figure under the invoiced 129,000?

A. 51%.

Q. All right. Now, did you do the same process with the carrot bags?

A. I did, sir.

Q. And without going into detail, you were invoiced for a certain number?

A. Right, sir.

Q. And he actually produced quite a few less?

A. Right, sir.

Q. Then you had a scrap there and you converted that scrap figure into bags?

A. Right, sir.

Q. And determined that there was a shortage of bags in those rolls under the invoiced number of how much?

A. 79%.

Q. And did you do the same thing with the potato rolls?

A. I did, sir.

Q. And what percentage of shortage did you find in the bags under the invoiced quantity?

A. 62%.

Mr. Wagner:

For the convenience of the Court and jury, we would like to offer this schedule in evidence.

The Court:

All right.

(Whereupon Defendant's Exhibit No 14 was marked for identification.)

Mr. Abbott:

Your Honor, we would like to reserve our objection until we can check the computations.

The Court:

Well, I will overrule the objection and you can go over the computations later.

Q. Now, Mr. Meyer, when did—well, let me ask you this, have you had any formal education?

A. Yes, sir.

Q. Training?

A. Yes, sir.

Q. In what?

A. Chemical engineering and business administration, with a major in cost accounting.

Q. Chemical engineering where?

A. Cornell University, sir.

Q. And then, in addition, business and cost accounting, you say?

A. Yes, sir.

Q. Now, without going into a great deal of detail about it, what concerns did you work for before you went to work for Mr. Vahlsing?

A. Socony-Vacuum and U. S. Rubber prior to the war, and American Cyanamid, Bakelite, Johnson and Johnson, and Celanese, after the war.

Q. And when did you go to work for Mr. Vahlsing's company?

A. January 28, 1954. It was my dad's birthday, that's how I recall, sir.

Q. That was in '54?

A. Yes, sir.

Q. And were plans then afoot to put in a polyethylene plant here—

A. Yes, sir.

Q. —at Elsa, Texas?

A. That is the reason I was hired.

Q. And when did you first come to Texas?

A. It must have been June 1st or 2nd, 1954. Just after Memorial Day week-end.

Q. And during those—let's see, that is about four months, wasn't it, that you stayed up around the East?

A. Yes, sir.

Q. What did you do during those four months?

A. I checked the design of the bag machines and I checked the firms who were using them, that is the different alternative bag machines available on the market, to confirm Mr. Vahlsing's choice, which was excellent, and whether any new modifications or improvements that the bag machine companies offered should be included as extras. I checked the design of it first. I redesigned the extrusion apparatus and designed the treating apparatus, sir.

Q. And then you came down here shortly after the first of June?

A. Yes, sir.

Q. By that time, had any of the bag making machines arrived here?

A. Yes, sir, they had arrived in, I believe, late March or early April.

Q. And as manager, I suppose you learned that they had been producing bags?

A. I had been informed of that during the time they were producing, I was in contact with Mr. Eliason down here.

Q. His testimony was that was in May or June,—

A. Yes, sir.

Q. —in connection with these particular rolls.

A. That's right.

Q. Well, now, let's see, how about Mr. Harry Borak, did you meet him during those four months that you were up in New York, looking over these other operators?

A. I did, sir.

Q. Did you visit his plant?

A. Yes, sir.

Q. And saw his operations, I assume?

A. I did, sir.

Q. Did you observe what character of measuring devices he had on his equipment?

A. Yes, sir.

Q. Did you observe anything with reference to his counters on his bag making machines?

A. I did, sir.

Q. And what was that?

A. He was using—

Mr. Abbott:

Your Honor please, I would like to object to the leading character of these questions.

Mr. Wagner:

I asked him what he observed.

Mr. Abbott:

Well, you referred him directly to the counting method and so on.

The Court:

I will overrule the objection.

Mr. Abbott:

He has answered "Yes, sir," to the last four questions.

The Court:

Go ahead.

Q. What did you—

A. Oh. He was using a small Veeder Root counter, actuated by a little piece of spring steel on the cutting knife.

Q. On the cutting knife, that is the tail end of the process of bag making, is it not?

A. It is, sir.

Q. Did you observe anything with reference to the condition of those Veeder Root counters?

A. They had continuous difficulty with the little piece of spring steel which actuated the counter because a piece of spring steel, after a sufficiently large number of repetitions, loses its springy quality, and then very frequently wouldn't actuate it. Furthermore, it if is bent or hit in any way, it no longer actuates.

Q. Were all of those you saw on his machines while you were there in good operating condition?

A. No, sir.

Q. Well, what did you observe?

A. During a visit with Mr. Pfaffenroth, our vice president and controller, we—

The Court:

A little louder.

A. Oh, I beg your pardon. During a visit with Mr. Pfaffenroth, a vice-president and controller of F. H. Vahlsing, from New York, we saw one machine operating without any counter at all, on our bags, because they contended they didn't have a spare counter available to put on the machine and one had broken.

Q. At the tail end of the bag making process, specifically referring to Mr. Borak's plant, did all of those bags reaching the end of the cutter operation, which cut loose from the roll, were they all in perfect condition or did you observe anything in that connection?

A. We observed a good many bad bags during the operation.

Q. And what was done with them?

A. Those bags were thrown into scrap and the counter was not turned back. Mr. Pfeiffenroth and I both observed that.

Q. Now, was that before you came down here in June?

A. It was, sir.

Q. All right. Now, I will hand you this D-8, that is that violation slip. There have been some questions here, that that, when first made up, had on it, in addition to short count, which is still on there, "Short weight on rolls" violation,—

A. Right, sir.

Q. —and that as a result of a conversation with you, that the violation which was originally on there about a short weight on the rolls was stricken off.

A. Right, sir.

Q. Will you explain that?

A. I explained to Mr. Dolan, we weren't buying pounds in roll form, we were buying bags and paying on the basis of bags coming out of those rolls, and the only way we could find out how many bags were in them were to run them down here, or at any other location designated.

Q. As to whether the rolls were over or under didn't make any difference—

A. Check, sir.

Q. —so far as price was concerned?

A. Right.

Q. Now, then, with reference to Mr. Borak's charge that he wasn't given any opportunity to participate in the count that was going on down at the Bureau of Weights and Measures, did you have any communication with him about the intention to have the Bureau count a bunch of his boxes?

A. I did, sir. We picked up the first shipment on August 2nd and Mr. Dolan, of the Bureau, was with me at the time. When I came back for the second shipment, I am not sure, I think it was August 11th, I went in to Mr. Borak and told him I was having his bags checked by the Bureau, as we had had bags of other suppliers previously checked; I asked him if he wanted to join me down there and check the count. I am afraid Mr. Borak's—

Mr. Abbott:

Now, if the Court please, that is clearly—

A. He asked me to leave, used foul language and indicated that he would not accept their figures nor cooperate, that once the bags or the rolls left his place, he had finished his responsibility, they were no longer his, they were mine.

Q. Now, let's see, you were not in New York at the time of these transactions in August and September involving the Bureau and the settlement of the libel suit and those things?

A. No, sir, I left New York, I think about the 28th or the 29th.

Q. Of what?

A. August.

Q. Oh, you first came down here in June and you went back?

A. Yes, I just came down here to check the installation of the press and then I went back to check the operation of other machinery before we accepted it from manufacturers.

Q. And then you participated in this counting business?

A. Yes, sir, I was in New York in July and August.

Q. And then when did you come back to Texas?

A. I drove down Labor Day week-end, sir. I couldn't say what the dates were. It was the end of June and the early part of September.

Q. End of June?

A. I mean the end of August.

Q. Or the early part of September?

A. Yes.

Q. And how long were you down in the Valley then before going back to New York?

A. I stayed here until January 13th.

Q. Then, on January 13th, you went back to New York?

A. Yes, sir.

Q. And how long were you up there on that January 13th trip?

A. Approximately two and a half weeks.

Q. And then where did you go, did you come back down here?

A. Yes, sir.

Q. Now, you have heard the testimony of Mr. Levermann and Mr. Blackwell with reference to your indoctrinating them as salesmen in connection with polyethylene and its properties in bags—

A. Yes, sir.

Q. —and selling points and competition that they might meet, and in those indoctrination sessions, did you have occason to make any reference to Roto-Lith, Limited, or Mr. Borak?

A. Yes, sir.

Q. What did you say?

A. I didn't say it specifically in regard to—well, I told of the incident in New York where Mr. Vahlsing had been short counted by Roto-Lith, told of our appeal to the Bureau of Weights and Measures, that

they had found him short, and that we were involved in a lawsuit with him.

Q. In the course of those indoctrination courses, did you have occasion to take up the subject with them of whether or not they might run into competition that was—I don't know, cut prices or—

A. Yes, sir.

Q. —cut rates or something of that sort?

A. I had tabulated data for Mr. Vahlsing, itemizing, for example, on the same size carrot bag, purchased from three or four different outfits, what the price would be from each outfit, on the exact same bag, and the comparative price would be with Mill Print, Shalimar, Traver, Growers, Bemus, or any of the big five in the industry, and showed them what they would encounter in the field on different prices on the same bag from different buyers, and I cited papers from the National Flexible Packaging Association where they told in these papers of the different tricks that could be used to offer a cheaper first price. I also told them of Mr. Vahlsing's experience and stated that if he didn't have his own plant operating by this season, he would be buying bags from either Mill Print or Shalimar, since even though the first price was higher, their final price was much cheaper.

Q. Now, what do you mean by first price and final price?

A. Well, we will—

Q. What do you mean by first price?

A. The price that you are quoted by your converter.

Q. That is what you paid for it—

A. That's right.

Q. —on your invoice?

A. That's right.

Q. What do you mean by your final price?

A. What you finally pay in actual cost, based upon the quantity that you receive, the breakage, the speed of packing, the—oh, handling throughout your shed. There is a great difference in polyethylene, sir.

Q. In other words, the number of usable bags you get?

A. No, also the speed with which the bags will open. You can double your speed of packing in a shed by using a high slit versus a blocking film. There are many factors regarding the nature of the animal itself that have to be considered in the price.

Q. Now, I suppose you had more than one conversation with these different salesmen?

A. Oh, yes, sir.

Q. Many conversations with them?

A. Yes, sir.

Q. Who was the salesman that came down into this Valley area?

A. Bob Blackwell.

Q. How did you and Bob Blackwell get along?

A. Not too well, sir.

Q. Well, now, let's not be modest about it. You heard him testify about you. Did you have any difficulty with him?

A. Yes, sir, I told Mr. Feld, as far as I was concerned,—

Mr. York:

If the Court please, this is outside the hearing of any of these parties and would be hearsay, apparently.

The Witness:

Oh, beg your pardon,—

Mr. York:
He is starting to testify to conversations—

The Court:
Blackwell testified here, didn't he?

Mr. Wagner:
Yes, Blackwell said that they had almost a verbal fight.

The Court:
And you objected to going into it and I wouldn't let them go into it because it was hearsay as to you and now you are going into it.

Mr. Wagner:
No, Your Honor, Mr. Blackwell testified without objection that he and this man didn't get along, that "We almost had a verbal fight in Mr. Feld's office," was the way he put it, think.

The Court:
Well, he started to and you objected to it.

Mr. Wagner:
No, Your Honor, I couldn't object to anything—he said it was a fight with this man. He testified to his side of it. I am sure I didn't object to it. How could I? It was a conversation with this man that he was relating, and I am simply seeking to show a motive and the bad will—I don't want to go in any detail—

The Court:
All right.

Mr. Wagner:
—about it.

The Court:
All right.

Q. Just in a few words,—

Mr. York:
May it please the Court,—

The Court:
Yes, sir.

Mr. York:
—he is fixing to testify to a conversation outside the—it is a hearsay conversation that he started to mention there, he told Mr. Feld, and that's where he stopped.

Mr. Wagner:
Well, I will start over again.

Q. How did you and Mr. Bob Blackwell get along, he as salesman in this area for Lone Star, who was the exclusive representative for the sale of Texas Plastics? Did you all get along—don't go into a conversation now. Did you all get along,—
A. Well, sir,—
Q. Were you dissatisfied with his operations as salesman?
A. Yes, sir.
Q. Did you register a protest with his boss, Mr. Feld, on the subject?

A. I wrote him a three page letter early in February, asking that he be—

Q. Don't say what it was, now. You did register a protest?

A. Yes, sir.

Q. And he was taken out of this area?

A. No, he wasn't, sir.

Q. Oh, well, you heard him testify about the almost verbal fight or—I don't recall the exact language—

A. Nor do I, sir.

Q. Sir?

A. I don't either.

Q. You don't remember any occasion like that that he was talking about?

A. Verbal fight, no. I could never find him to fight with him.

Q. All right. Now, back to these things you said, now, Mr. Meyer, I am going to turn through the language they say that you used to these two witnesses, Bob Blackwell and Dutch Levermann. He says that you told—Mr. Borak says that you told those men, "In selling bags for us, you are going to run into some cheap chiselers and crooks, like Roto-Lith and Harry Borak." Did you make that statement?

A. I used—no, sir.

Q. Have you ever called Harry Borak or Roto-Lith crooks?

A. May I modify my answer?

Q. Yes.

A. I have frequently said they may run into cheap chislers and I have cited the nature of the chiseling. I have never accused anyone of being a thief or a crook. If the shoe fits, I am not putting it on.

Q. All right, you said you cited the nature of the chiseling. What do you man by that?

A. Giving short count, giving thin guage, using a high proportion of scrap in the extrusion of the film—which is quite common in the Northeast, with small extruders, and quoting on outside rather than inside dimensions.

Q. They say that you said, "We filed a complaint with the Bureau of Weights and Measures on some bags they sold to us and they had to pay a fine."

A. That is—

Q. Did you say that?

A. —untrue, sir.

Q. Did you say that you filed—

A. No, sir.

Q. "We filed a complaint with the Bureau."

A. Yes, sir, I said we filed a complaint, which is true.

Q. With the Bureau of—

Mr. Abbott:

If the Court please, we object to this continual volunteering of remarks on the end, "which is true" and so forth.

The Court:

Well, I will overrule the objection.

Q. Did you make any statement that they had to pay a fine?

A. No, sir.

Q. Now, I don't know, I suppose this is supposed to be referring to Roto-Lith and Harry Borak, "You can tell your customers that they will wind up paying more to them than they will to us, even if our price

is a little higher." Now, "them", you did make some such statement referring to these chiselers,—

A. That's right, sir.

Mr. Abbott:

Your Honor please, he is leading the witness.

Q. All right.

The Court:

He has been volunteering here and—

Q. Did you make—

The Court:

You don't need to lead him.

Q. Did you make that statement specifically referring to Roto-Lith and Harry Borak?

A. No, sir.

Q. Did you make the statement that "We had to sue them in one case"?

A. No, sir.

Q. Did you make any statement with reference to a suit?

A. Yes, sir.

Q. What did you say?

A. We were involved—I believe I said we were involved in a lawsuit. It is nearly two years ago and I can't recall my exact words at the time.

Q. Now, then, they say that on or about the 5th of January, you made these statements to Edd Boler "You have to be careful in buying bags because there are a lot of crooks in the business, like Roto-Lith and Harry Borak." Did you say that to him?

A. Would you check the date on that, sir? It doesn't ring true.

Q. It says, "January 5, 1955."

A. I can't swear for the date, but will you repeat the rest of the question?

Q. Now, I am not so interested in the exact date, but the statement, "You have to be careful in buying bags because there are a lot of crooks in the business, like Roto-Lith and Harry Borak."

A. I did not, sir. I never called him a crook or a thief.

Q. "You have to watch out for short count, thin gauge and quoting on outside instead of inside dimensions."

A. That, I said, many times.

Q. Do you have any specific recollection of the exact language that you used in talking to Edd Boler, as distinguished from anyone else?

A. No, sir.

Q. But is it your testimony that you didn't say that Roto-Lith and Harry Borak are a lot of crooks because you never said that to anybody, is that your testimony?

A. It is untrue, sir, and I wouldn't say it.

Q. Now, then, the statement—

The Court:

Wait a minute. Let's see. What do you mean by that, you mean it is untrue that you didn't say it, or that it is untrue that they are not—and that they are not crooks?

A. I only know that he short counted, sir. If he did it, it isn't up to me to judge whether it was intentional or deliberate. That, and that only, deter-

mines his category. I can't say if he is a crook or not, it is not up to me. I can say he short counted us.

The Court:

Well, I don't believe I want to argue that with you, I am just trying to get your answer.

A. Oh, I'm sorry, sir.

The Court:

Go ahead.

Q. "We had to sue Harry Borak and Roto-Lith for giving a short count on the bags they sold to Mr. Vahlsing." Did you say that?

A. No, sir.

Q. "We filed a complaint with the Bureau of Weights and Measures against Roto-Lith and Harry Borak."

A. Yes, sir.

Q. "Because they violated the regulation."

A. I didn't know if they violated the regulations, that is up to the Bureau to determine, not me. I merely filed the complaint.

Q. "And they had to pay a fine."

A. That case was still pending when I left New York and I never heard anything further on it. I don't know. I didn't say that. I don't know whether they paid a fine or not, or I didn't know.

Q. The statements that you made with reference to Mr. Borak and Roto-Lith, did you honestly believe they were true?

A. I did, sir.

Q. Do you still believe they are true?

A. I do, sir.

Q. Oh, yes, now, you heard Mr. Borak testify about the conversation he had with you sometime about the middle of February, in which he asked you to meet him at the Casa de Palmas and you went there?

A. Correct, sir.

Q. And he and Fred Stone were there,—you recall that occasion?

A. I do, sir.

Q. Would you tell us what conversation you had with Harry Borak on that occasion, what your conversation with him was?

A. In the beginning, he was very cordial, congenial, friendly, asked me how we liked it down in the Valley, how my wife liked it here, how she was feeling—because she was due to have a baby shortly; if we had found a home, how we liked the people; we talked about different suppliers, marketing problems, which inks were better and which inks were worse, which film was better; just general business problems.

Q. All right, did he bring up the subject of reports had come to him that you were saying disparaging things about him?

A. He mentioned that he had heard that I had mentioned the short count in New York, at which time I admitted it quite openly, I had mentioned the short count, I told him I had spoken to three men and three men only in the Valley, and mentioned their names; I sincerely apologized to Harry for ever mentioning the short count, particularly when he cited various instances to me in past business practice about never saying anything about a competitor if it is unfavorable. I apologized to him very sincerely

and I promised never to mention it again. I kept my word on that. We parted very friendly. We had a congenial, pleasant evening, together, and I think it was two days—or a few days later, I was sued for $400,000.00.

Q. Well, now, specifically, he testified that you said, "I lied about you. I thought it would help me in my selling." Did you say that?

A. I did not, sir.

Q. Did you say to him, "I am sorry I lied about you. It is the stupidest thing I ever did"?

A. I told him it was the stupidest thing I ever did, to say anything adverse about a competitor, and I followed that policy since.

Mr. Wagner:

That's all.

The Court:

We will take a ten minute recess. Now, don't discuss the case, don't let anybody discuss it in your presence, lady and gentlemen. Everybody keep your seats until the jury has retired.

(Whereupon a ten minute recess was taken.)

Cross Examination.

By Mr. Abbott:

Q. Mr. Meyer,—

A. Yes, sir.

Q. —when did you get out of school?

A. Which school, sir?

Q. Well, the last one.

A. The last one, I believe, was the—either June of '51 or '52, I am not certain, sir, or might have been—I think it was June, '50, or '51.

Q. June, '50, or '51?

A. Yes, sir.

Q. About how old are you, sir?

A. Thirty three.

Q. And had you worked for a great number of these companies that you referred to prior to the time you went into school?

A. I was at night school, sir.

Q. You were at night school?

A. Yes, sir.

Q. How long were you in—

The Court:

A little louder, please.

A. Oh, I beg your pardon. What?

Q. How long were you in school?

A. Where?

Q. Well, at Cornell and where else you—

A. Five years, Cornell.

Q. Where else?

A. Three years Rutgers, at night, five nights a week.

Q. Now, the five years you were at Cornell, was that night school too?

A. No, sir.

Q. That was day school?

A. Yes, sir.

Q. Therefore it was around 1948 when you got out of Cornell?

A. No, sir, it was 1944, February of '44.

Q. When you left Cornell?

A. Yes, sir.

Q. And what did you do after that time?

A. Went to work for U. S. Rubber, on their elastic fabric unit up at Naugatuck, Connecticut.

Q. And how long did you stay with them?

A. Quit the job after five months and enlisted in the Navy.

Q. And how long were you in the Navy?

A. 'Til September of '46.

Q. And then what did you do?

A. Went to work for American Cyanamid, in their Calco chemical division at Pine Brook, New Jersey.

Q. And how long did you stay with them?

A. Trying to figure when I left. Must have been about a year and a half.

Q. So that would make it in the middle of 1947, you left them?

A. I haven't checked the dates. Wait a minute.

Q. Well, that is approximate?

A. Yes.

Q. And then what did you do?

A. Went down the road to Bakelite, became project engineer for their Vinyl plant.

Q. And how long did you stay with them?

A. One year, and then the bottom dropped out of the market and they fired five out of—six out of the nine project engineers that they had, so I walked down the road to Johnson & Johnson.

Q. That would be the middle of '48, then, you went to work for Johnson & Johnson, approximately?

A. Yes, in that range somewhere.

Q. And how long did you stay with them?

A. Two years.

Q. Two years. So, the middle of 1950, you moved on again. Where did you go that time?

A. The end of '50, I think it was. Wait a minute. It was June or July of '50.

Q. And then how long did you stay with them?

A. With who?

Q. With the next company.

A. About two years, little over two years.

Q. Little over two years, so up to June of '52, you were—you stayed with that job about two years and moved on somewhere else then?

A. That's right.

Q. What was the company that you left?

A. Which one?

Q. In June of '52.

A. Celanese Corporation of America.

Q. Celanese Corporation. And then what did you do?

A. Let's see. I had a job for about three months with a small outfit called Cenbro Plastics, in New York City. It wasn't a job, I was there with the option of buying half of it.

Q. You were looking over that project out there?

A. That's right.

Q. And what happened?

A. Didn't think it was a profitable business venture.

Q. And then you left there. What did you do then?

A. Went ice skating up in the mountains for a week and then I met Fred Vahlsing.

Q. And then you went to work for him in—let's see, 1953 or '54?

A. '54, January 28th.

Q. Well, what happened to the year 1953?

A. 1953, I was still working for Celanese.

Q. I see. And you left them in June? You stayed with them, then, about a year?

A. With them?

Q. Yes.

A. No, it was a little over two years.

Q. Little over two years. You have had quite a few jobs since you got out of school,—

A. Yes.

Q. —or in the meantime? Now, when you were at Mr. Borak's plant with Mr. Pfaffenroth, was it?

A. When?

Q. Well, in 1954. The time that you observed the counting mechanism that you referred to on direct testimony.

A. Mr. Pfaffenroth was there on one visit with me.

Q. Was that the time that you observed the counting—

A. That was the time when both of us observed it.

Q. You observed it at that time?

A. I observed it at other times, too.

Q. But at that time, you did observe it?

A. Yes.

Q. What time of the day or night was that?

A. I have no recollection. Probably mid or early afternoon.

Q. Could it have been quite late at night?

A. What is "quite late"?

Q. Well, to me, after 9:00 o'clock, up until 3:00 o'clock.

A. It was before 9:00 o'clock.

Q. Before 9:00 o'clock. And you were there on that occasion with Mr. Pfaffenroth?

A. I was there once with Mr. Pfaffenroth, sometime in the early or mid afternoon.

Q. All right, sir. Were you there on other occasions—

A. Yes, sir.

Q. —at night? How late at night?
A. Wait a minute. When?
Q. On other occasions.
A. I was there once at night.
Q. How late at night?
A. After theater; it must have been about 11:30.
Q. About 11:30. What was your interest in being there at 11:30 at night?
A. I was going on my honeymoon and Mr. Borak gave me a dozen bags to put some shirts in.
Q. That's why you went by?
A. That is the only reason. I didn't enter the plant. I stopped at the outside office, where the bags were laying.
Q. Were they working?
A. Yes, sir.
Q. On whose bags were they running?
A. I didn't check.
Q. Now, as a matter of fact, Mr. Meyer, you know that he was running night and day on your bags, wasn't he?
A. I don't. He says so.
Q. You have no idea?
A. I don't run his plant.
Q. Well, you were there on a great number of occasions, weren't you?
A. I don't keep track of everything that is running on every occasion over two years ago.
Q. Well, then, on the occasions that you were there.
A. On the occasion I was there with Mr. Pfaffenroth, I repeat my statement regarding a counter not working and bad bags being thrown away without being substracted from the count. At other times, I just made general observations, as to the operation

and the physical—and operational difficulties that he encountered, that's what I was interested in.

Q. And that was at Mr. Vahlsing's suggestion that you do that?

A. Mr. Vahlsing's suggestion that I do what?

Q. Go by the plant and observe the—

A. Which plant?

Q. Roto-Lith plant.

A. It was suggested a great many plants, if I wanted to go by, and—

Q. I didn't ask you that, Mr. Meyer. I would like to tie this down to tre Roto-Lith matter. He did suggest that you go by the Roto-Lith plant?

A. He did not suggest "You go to Roto-Lith." He suggested we might go to any of these plants, and he gave me a long list.

The Court:

Was Roto-Lith on the list?

A. Yes, sir.

Q. And then you did?

A. Yes, sir.

Q. How many times did you visit there?

A. I think three times during the day and that one time at night; possibly two times, possibly four times, I don't recollect the exact number.

Q. Now, you were interested in the way their plant was set up, the way their bag machines were lined up, or how they came off, for the purpose of enabling you to analyze their position to see whether it would fit into your scheme down here?

A. I didn't say that. You did.

Q. I am asking you the question.

A. No.

Q. Then you had no purpose being there whatsoever?

A. No, you stated the specific purpose for which I was there.

The Court:

No, he asked you a question, if that wasn't your purpose?

A. I wanted to see the general operating problems that he had. I had seen bag machines. I had run them and designed them before, and I had seen printing presses before.

Q. You had designed them before?

A. I had redesigned them.

Q. Now, you heard Mr. Vahlsing say that you had had no experience and that's why he sent you there, didn't you? You were here in the Courtroom.

A. I didn't hear Mr. Vahlsing say I had had no experience.

Q. How much experience had you had?

A. I had seen just about every bag making machine on the market, for everything from pliofilm to acetate to cellophane to poly, up and down the line; we had redesigned them and tested them. That was part of our program in Celanese and I had worked on the redesign and had evaluated them with Celanese. Is that sufficient?

Q. I am sure it is. Now, what connection did you have with the making or setting up the machines that you were going to use at Elsa, Texas, for Texas Plastics?

A. What do you mean by—you mean the installation in the plant, the design, the testing, what, sir?

Q. The ordering of them, the procuring of them, the transportation of them to Texas, to the installation, and the ultimate putting them into production, what connection did you have?

A. The only signature that anyone will respect on an order from Texas Plastics is Mr. Vahlsing's. I checked the design, revised it or altered it where necessary; he did the ordering and we checked on the firms from whom he ordered, to find out if I had any suggestions to the contrary and if anything better was available.

Q. Do you ever recall making a statement to the effect that when you first went to work for Texas Plastics in January or February of '54, that you started designing the machinery?

A. On the treater, I did. On the extruder, I did.

Q. You designed those?

A. Well, from what—there are standard extruders on the market that have been known for years. The specific one we are now using and the modifications and improvements on it, I designed.

Q. Do you remember saying that you designed the extruder and the treater?

A. Say I redesigned or modified the extruder and I designed the treater.

Q. Then if you stated that you had designed them, you were incorrect, you are now changing your statement?

A. That all depends upon the scope of "design".

Q. Well, answer my question. If you made the statement—

A. No, I was not incorrect.

Q. —that you designed the machinery, you are now changing your statement?

A. No, I am not, sir. I didn't design the motors on it, those were already designed in standard units that were available; I didn't design lots of other standard units that were available; I redesigned the way they were assembled, the way they were controlled and the way they would operate, which is the fundamentals of an extrusion operation.

Q. If you stated that you designed the machinery at a prior time, is that statement correct or incorrect?

A. Once again, you will have to tell me what "design" means.

The Court:

Answer his question, please.

Q. The extruder and the treater.

A. I designed the treater, period. I redesigned the extruder.

Q. So if you have previously stated that you designed it, you are now changing your statement to say that you redesigned it?

A. Yes. All right, sir.

Q. Thank you. Now, you stated on direct examination that Mr. Borak was having continuous trouble with his machines.

A. I don't recall that.

Q. Well, if the record would reflect that you said he was having continuous trouble with his machines, would you like to have it read back?

A. Yes, which phase of which machine?

Q. Well, that was responsive to your counsel's question. You said he was having continuous trouble with the machines.

A. With his counters, sir.

Q. With his counters?

A. Yes, sir.

Q. All right, and that was—he was having a lot of trouble with them?

A. Yes, sir.

Q. And you know that because you were there on two or three occasions at the most?

A. Yes, sir.

Q. And that is a lot of trouble,—

A. It is—

Q. —in your mind?

A. It is if you don't put the proper quantity in a box for a customer, sir.

Q. So you don't make the statement that he was having trouble because you saw that he was having trouble, but you are only guessing at what the trouble was, aren't you?

A. I saw, when I was there, he was having trouble with the counters. I talked to Mr. Borak about the design and suggested electric actuation, instead of a spring arm, would solve all of the difficulty. We use electric actuation, and we have never had any difficulty, and it costs $8.00 more for each counter. Is that sufficient, sir?

Q. Well, specifically, one type costs $9.00 and yours costs seventeen?

A. On a $7,000.00 machine.

Q. There is a few dollars difference in them. Now, he was having a lot of trouble, of course, continuous trouble with this counter;—

A. When I was there.

Q. —did you make that observation based upon what you allege were short counts in the bags?

A. No, sir.

Q. What do you make it on?

A. Because he didn't have one operating on one machine, they were having difficulty on a second machine, they were continuously adjusting the spring arm, while I was there.

Q. Well, now, on one occasion?

A. No, sir.,

Q. How many occasions?

A. I specifically noted it on one, and on the other oh, one, two or three occasions, it stuck in my mind that he was having difficulty with them.

Q. Well, that was every time you were there, then, wasn't it?

A. I will modify the word "continuously." He was having difficulty while I was there.

Q. Thank you, sir. Now, you also stated on direct examination that you saw some bad bags coming off the end of the line and that they were thrown into a scrap and the counter was not turned back.

A. That is correct, sir.

Q. Now, how many times did you observe that procedure?

A. Just once, with approximately 150 bags, and I believe they were putting 1,200 bags in a box at that time. Mr. Pfaffenroth was with me.

Q. They were putting 1,200 bags—

A. These were large potato bags. I believe it was 1,200. I am not sure, sir.

Q. And you stood there and observed that a hundred or a hundred and fifty bags were thrown out?

A. I observed that all the time he was adjusting the back seam on the bag and he had bad bags, he let his counter go and didn't turn it back, or make any notation of the number when he started to put the bags in the box.

Q. When did this occur?

A. In the afternoon when I was there with Mr. Pfaffenroth.

Q. Now, in an operation of that type, these bags come off how many a minute?

A. Depends on the machine, the length of the bag and the skill and efficiency of the operator.

Q. Well, let's assume that you had a four and a half by eleven and a half carrot bag, is that a good size?

A. Say just in twelve inch lengths.

Q. All right, how many of those will a bag machine produce in a minute?

A. Which bag machine, sir?

Q. A bag machine, let's say the one that Mr. Borak had up at his place.

A. He has two different ones. One will probably go to a hundred a minute, that is its rated capacity; the other is rated at sixty per minute, and if you can average about 80% of capacity, you are doing well.

Q. And that means that that often, he is making a bag, he is making them just about—

A. Approximately once a second.

Q. Once a second?

A. Or more or less.

Q. Or more or less?

A. That's right.

Q. Now, then, if an operator was trying to adjust a seam on the bag, where does he go to do it?

A. On the machine. The whole machine is only about six feet long.

Q. From the end of the roll to the final point at which they are stacked?

A. Yes, sir.

Q. About six feet long. He has to make the adjustment somewhere on the machine, doesn't he?

A. That's right.

Q. And he has to move away from the counter?

A. Correct. The counter is within an arm's length.

Q. But he has to move away from it?

A. Yes, sir.

Q. And he has to—the bags that are produced that weren't sealed just exactly right, he has to take those out?

A. He does not, sir. They are mounted on the stacker, right at the counter.

Q. All right, they are mounted right at the counter, but presumably, he should take those out and replace them with good bags at a later time?

A. No, sir.

Q. No? If he is having trouble with the sealing?

A. Well,—possibly yes. No, it is much easier to just note the number of the counter on that time and over-run that box by that many.

Q That is a way of doing it, isn't it?

A. Yes, sir, that's the way we do it in our plant. I don't presume as to how Mr. Borak does it.

Q. Now, if you have got a counter that cannot be turned back, what do you do?

A. I have never seen one of that type.

Q. Well, now, you saw this little Veeder Root Counter, didn't you?

A. Yes.

Q. And can you turn it back?

A. Yes.

Q. Can you turn your electrically operated counter back?

A. Yes, it is just a one way rachet.

Q. Just a one way rachet. Do you have one of the Veeder Root counters with you?

A. No. I don't have a bag machine or—

Q. Now, isn't it true that that Veeder Root counter that we are referring to, when you turn it, it goes all he way back to zero?

A. That's right.

Q. So it wouldn't do any good to try and turn it back 150, would it?

A. If you are starting a box, that is the object.

Q. If you are starting a box, but say in the middle of a run.

A. I am listening.

Q. If it were in the middle of the run, what would you do?

A. I would note the number of good bags at the time that you turned it back, if I am putting 2,000 in a box, and I had a thousand good bags before I had the trouble, I would write the number, a thousand, I would know a thousand more have to go in the box, and turn it back to zero.

Q. Now, do you also do that with your counters?

A. We do.

Q. Do you run them?

A. I originally worked, in training the men to run them.

Q. What is your position with Texas Plastics, Mr. Meyer?

A. General manager.

Q. As such, you have the over-all operation of that business, don't you?

A. Within the limits that Mr. Vahlsing has specified.

Q. Now, in discussing this incident that you had with this meeting in Houston and subsequent meetings

with Bob Blackwell and Dutch Levermann and Bill Fullick and so on, is it your position that you never said that you had to sue Roto-Lith, Limited?

A. I can't swear I didn't. I can't swear I did, sir. It is untrue and therefore I doubt that I would say it, but cannot recall my exact language.

Q. Well, now, Mr. Meyer, would it be fair to ask you if you are a man on edge, always anxious to get things done, or an excitable person?

A. At times. Now, particularly.

The Court:

A little louder, please.

A. At times. Now, particularly.

Q. You were interested in making a big success down here, weren't you, when you came here from New York?

A. I was interested in making a success of the operation.

Q. And you had a great deal of enthusiasm about how to go about it?

A. Not about how to go about it. I had a lot to learn on that.

Q. Well, when you first came down, though, sir, you had a lot of enthusiasm; you have learned some things since?

A. I still have a lot of enthusiasm about it.

Q. Now, in that connection, you undertook to tell Bill Fullick and Dutch Levermann and Bob Blackwell and even Mose Feld—

A. That's right.

Q. —what you knew about the business and what you thought should be done; you were interested in

protecting your potential customer that you didn't have yet?

A. That's right.

Q. And you wanted them to know how they could be cheated?

A. No, I wanted Lone Star's salesmen to know what to look for.

Q. Well, now, if you didn't want them to know, why did you prepare a chart showing the distinction on quoting outside instead of inside dimensions?

A. Primarily because we use them in our own plant, when we have got an order for so many bags, that's how we schedule how many pounds of film we need for the order.

Q. But you took this not for the use in your own plant, but to these men?

A. That's right, they are also used by the shippers on incoming shipments. We have one in each of Vahlsing's sheds, and many other men have requested that I send them to them, the same as Visking or Durfene, Oland or anybody else.

Q. You have made them available to everybody?

A. So do they.

Q. I say, you have made them available?

A. That's right.

Q. You have tried to impart as much information, that would be beneficial to your position, as you possibly can, to show how others can cheat?

A. No, sir, I have tried to impart as much informations so they could protect themselves against it.

Q. And you have told them what they had to protect themselves against, haven't you?

A. I have told them a simple method of checking.

Q. And you have told them that it would be necessary to know these things that you have created

in this chart so that these cheap chiselers and crooks would not get to them?

A. I don't recall using that language at any time.

Q. You do recall using the word "cheap chiselers," clearly?

A. In conversation with Mr.—with the Lone Star representative, yes, I admitted that. Now, you are talking about various customers. There is a distinction.

Q. Well, you know what you said, don't you?

A. Yes.

Q. And you have heard these gentlemen, Mr. Levermann, Mr. Blackwell and Mr. Boler, come in and say what you said to them.

A. Yes.

Q. Now, Mr. Meyer, you had a meeting at the Casa de Palmas, with Mr. Borak, in February of 1955?

A. That's right.

Q. How did that come about?

A. Mr. Borak dropped over the plant, said "Hello," I took him all the way through, showed him anything he wanted, we discussed mutual problems, and he invited me to drop over and have a drink and we would go out to dinner together.

Q. Now, who was present at that meeting?

A. Mr. Fred Stone, Mr. Harry Borak and me.

Q. And where is Mr. Fred Stone now?

A. He was killed a year ago, sir.

Q. Now, isn't it true that Mr. Borak confronted you with the stories that he had heard down here?

A. No, sir Wait a minute. May I modify that? With what stories? You have contended one thing, we have contended another.

Q. All right, isn't it true that he confronted you with the stories that had been told to him by Max Lutz, Burton Benson and Edd Boler?

A. That is entirely incorrect, sir. He said he had word that I had mentioned the short count down here and had been talking about it and I told him who I had spoken to; Mr. Borak, at that time, didn't know; and those three names were used in the initial citation against me. I admitted the evidence against me, sir.

Q. You admitted it?

A. Yes, sir.

Q. That those statements were made?

A. Which statements?

Q. The ones that were alleged in the original—

A. No, sir, the ones that I said, and I admitted them.

Q. You limit yours, quite distinct from the ones that Mr. Boler, Mr. Blackwell and Mr. Levermann testified to, don't you?

A. No, I think they contradicted each other, though my memory may be in error.

Q. Isn't it true that you told them that Borak would, and Roto-Lith, "short count you"?

A. I don't run Mr. Borak's operation. I can't tell what he is going to do, sir.

Q. Well, isn't it true that you told them that they would "short count you"?

A. I said they might.

Q. They might. Now, isn't it—let's see if we can think that over. Isn't it true that you said that they would?

A. No, sir, I don't run his operation. I don't know what he is going to do.

Q. Well, but you were relying upon what you thought was your experience with him, in making these statements?

A. You are asking me whether I said "might" or "would" in a conversation two years ago. I don't know, sir.

Q. Well, now, let me ask you about that two years ago, not because it is important, but—

A. Sure.

Q. —because it was only about fifteen or sixteen months ago.

A. I'm sorry.

Q. Two years is a little more than it actually was. Would that help your memory?

A. No, I can't recall exact wording in conversations two weeks ago, unless I am going to use them in evidence somewhere, and then I would have to write them down.

Q. Well, on that occasion, when Mr. Borak confronted you with this, didn't you apologize to him?

A. Yes, sir, I apologized for what I had said.

Q. And didn't you say you wouldn't say it any more?

A. And I kept my word, sir, I never mentioned it again.

Q. And thereafter, didn't you go to Max Lutz and repeated those words?

A. I did not, sir.

Q. Mr. Meyer, you went by Max Lutz' shed—

A. Right, sir.

Q. —and determined that he had placed an order with Roto-Lith?

A. I did not, sir.

Q. Did Max Lutz call you and tell you?

A. I don't recall. He might have spoken to the Lone Star men. At that time, I had no contact whatsoever in selling. That was done exclusively by Lone Star.

Q. Well, now,—

A. Max Lutz refused—

Q. Now, excuse me, don't go into the volunteer statements.

Mr. York:

Could we have that last statement stricken, Your Honor? It is unresponsive, what he has to do with selling.

The Court:

Yes, I will strike it.

A. Sorry, sir.

Q. Now, you found out that Max Lutz had bought bags from Roto-Lith, didn't you?

A. I don't recall.

Q. You have no recollection whatsoever?

A. I found out sooner or later, but I don't know when or how.

Q. But you found out about it,—

A. Yes, and I believe it was—

Q. —and what did you do then?

A. As I recall, I steered clear of everybody at that time, after the conversation with Mr. Borak, and I told Max if ever there was a delay in bags coming from the Northeast and he was in a jam, it didn't matter whether he needed a hundred thousand or fifty thousand, we would give them to him at the million bag price, and I believe there are letters in my file which will confirm that, sir.

Q. All right. Now, the statement there is—when you said "the Northeast," who were you talking about?

A. Hold it, sir. Excuse me. May I modify that last statement? The notification of Max Lutz' purchase came to me in a letter from Mr. Mose Feld, the president of Lone Star Bag & Bagging; I could have it in evidence for you tomorrow, and—

Q. I am just asking you the question, you did get the information, and then what did you do?

A. I told him if he was ever hung for fifty or a hundred thousand, when a shipment was delayed, or a truck shipment was lost, if he needed fifty or a hundred, we would still give them to him at the million bag price.

Q. And you knew then that he was then—he had placed that order with Roto-Lith, didn't you?

A. I wasn't trying to get it.

Q. But you knew he had placed it with Roto-Lith, didn't you?

A. Yes.

Q. At the time you told him you would help him if his shipments were delayed out of the Northeast?

A. That's right.

Q. In other words, what were you stating to him,—

A. That if he—excuse me.

Q. "—If you can't get delivery out of them, I will take care of you"?

A. I did not say that. Mr. Boler testified he was hung and Mr. Borak helped him. I didn't want his business. I had other business.

Q. You didn't want whose business?

A. Mr. Lutz. I could not take it. Mr. Vahlsing had forbidden that I take any business. All orders had to come through Lone Star, who had to approve them.

Q. All right, sir. Isn't it a fact that at the time that Max Lutz placed his order with Roto-Lith, that he requested the right to cancel the balance of the order with Lone Star and you?

A. He completed every order he ever had.

Q. That is not the question I asked you, Mr. Meyer.

A. He did not.

Q. He did not?

A. He did not.

Q. And isn't it also true that you procured Bob Blackwell to go talk to Max Lutz to revive the order and tell him these stories?

A. Mr. Lutz refused to have Blackwell in his office or have him call upon him. Only Mr. Feld or I could call Max Lutz. He would have nothing to do with Blackwell.

Q. I see. You called on Max Lutz?

A. I did not.

Q. Thank you. Well, did Mose Feld call on him?

A. I don't know whether Mose Feld was notified through Dutch Levermann, who was his sales representative down here, or through any other man. I got my letter from Mose Feld.

Q. And only you and Mose were authorized to call on him?

A. No.

Q. I misunderstood you.

A. I have never been authorized to call—I was not authorized to call, in selling, at that time.

Q. You are changing your statement, aren't you?

A. In what respect?

Q. Because a moment ago you testified that only you and Mose Feld were authorized to call on Max, becaue Bob Blackwell—

A. The word "authorized" was poorly chosen. I was never—

Q. All right, your attorney will go into that with you. Now, isn't it true that you went to see Max at or about that time, when Bob Blackwell couldn't do it, and told him that he had made a big mistake in buying bags from Roto-Lith, that they were crooks and cheats, and "I told you so; we had to sue them and we won the case,—"

A. I don't recall—

Q. "—and I have the records to prove it"?

A. I don't recall ever saying that, sir, which I have stated.

Q. Do you deny it?

A. Since it is untrue, yes, I deny it.

Q. Do you deny all of it or part of it?

A. You would have to read it back to me in detail.

The Court:

Sir?

A. I would have to hear it again in detail.

Q. Isn't that what you told him, in substance?

A. No, sir.

Q. What did you tell him, in substance, when he placed this order with Roto-Lith?

A. I didn't know it was placed with Roto-Lith until I received a note.

Q. I am asking you what you did on that occasion, sir, when you found out about it.

A. I just told you, if he ever got in a jam,—because it was six or eight days to ship bags from New York down to McAllen—if he ever got in a jam and he had carrots on the shed and no bags, we

would help him out. I was, personally, quite friendly with Max Lutz and with Mr. Boler and with Mr. Benson.

Q. You are still quite friendly with Mr. Lutz, aren't you?

A. And with Mr. Benson.

Q. Yes, sir.

A. Pardon?

Q. Yes, sir.

A. I don't—

Q. Now, Mr. Meyer, how much is Mr. Lutz indebted to Texas Plastics at this time?

A. I think it must run—I couldn't tell you exactly, it must be about twenty five, twenty seven thousand dollars, with the oldest invoices going back approximately forty five days, which is quite standard in the produce industry.

The Court:

I can't hear you.

A. I am awfully sorry. He is indebted to us to the extent of probably twenty five to twenty seven thousand dollars, and probably the oldest bills are about forty five, fifty days, which is quite common in the produce industry.

Q. But he does have that much indebtedness with you?

A. So far, yes.

Q. Now, you didn't sell any bags to Max Lutz after Roto-Lith started selling him, last year, did you?

A. I never sold him before, either.

Q. Well, you have sold them this year.

A. I didn't deny that. That's true.

Q. Well, you had his business in your plant.

A. When?

Q. In 1954, until the time that he shifted over to Roto-Lith.

A. Lone Star sold him, I think, three million bags, prior to the time he switched. Lone Star gets an order from a customer and, in turn, places an order with Texas Plastics. I was allowed to have no outside customers.

Q. Well, you heard Mr. Blackwell state that he had to complain about your being out selling?

A. That's right, sir.

Q. And who would he complain to, to you?

A. No.

Q. Then he complained to Mr. Feld, didn't he?

A. That's right, sir. I presume so. Maybe he spoke to Mr. Lesler or Mr. Fullick up there. In any event, I heard nothing direct.

Q. Now, Mr. Meyer, all of this matter that we have been going over today, with Victor Eliason's testimony, is merely a transition in the use of words, isn't it, when you refer to short count, what, in effect, you are saying, is that we supplied you a large number of rolls, for which we invoiced you at a per bag price,—

A. That's right.

Q. —and that you, in turn, made those into finished bags and they came out short?

A. That's right.

Q. And we short counted?

A. That's right.

Q. And that is the whole basis—or not the whole basis, but the major premise upon which we are having our difficulty?

A. Oh, no, sir.

Q. That is the primary problem that you have?

A. It is not, sir.

Q. Now, do you know how much roll stock you got into Elsa or Robbinsville or Mathis, from Roto-Lith?

A. I could find out by checking some records.

Q. Let me see I can refresh your memory. Are you familiar enough with the situation to know that, starting in December and January and February, to some extent, that Roto-Lith was working night and day to turn out bags for Vahlsing?

A. I have just testified I wasn't employed there 'til the end of January. How could I?

Q. You have heard that they did turn out a large quantity of bags?

A. I don't rely on what I hear, sir.

Q. But have you heard it?

A. I have heard it said by some and contradicted by others.

Q. All right. Now, isn't it true that there came a time when you were working for them, that they didn't need finished bags any more, that they would prefer to leave it in roll form and save you the cost of converting the roll to bags?

A. I don't recall that, sir.

Q. And as Mr. Eliason testified, while you were present in the room, that you wanted to do it also to acquire experience?

A. Excuse me. The film had not been converted—I mean had not been made into bags. It was in the printed form when we were starting to run our machines.

Q. That's what I mean.

A. We issued no order to Mr. Borak not to have it made up in bags, previously. That was his business. When we were ready to take the merchandise, it happened to be in printed roll form, so we took it in the roll form, to help us in setting up the machines.

Q. You don't know whether he had any arrangement or not that he would hold it in roll form and not convert it into bags?

A. He did not, because it was my suggestion that as long as it was there in roll form, we use it to set up our machines.

Q. That's what I am getting at, there was a suggestion—

A. To Mr. Vahlsing.

Q. All right.

A. As long as it was there, when we were ready to take shipment, we might as well take the rolls as they were. We never advised him before to leave them in rolls.

Q. All right, but in any event, when you were ready, you wanted it in roll form. You didn't say, "Well, now that you have got it printed, go ahead and put it into bags," you wanted it in roll form, didn't you?

A. As long as it was there, we said we would take it in roll form.

Q. All right.

A. We didn't say we wanted it.

Q. Well, now, when did that start, when you wanted roll stock?

A. It must have been about April.

Q. Well, could it have been somewhere around April the 13th?

A. Might.

Q. When you had a bunch of radishes in roll stock, that is the film for radishes?

A. I don't believe I made the pick-up or saw it. I believe Mr. Vahlsing called the plant and had it shipped down to Texas. I had nothing to do with that initial shipment.

(Whereupon Plaintiff's Exhibit No. 10 was marked for identification.)

Q. All rght, I show you what purports to be a copy of invoice marked Plaintiff's Exhibit No. 10 and ask you if you recognize the delivery shown there?

A. I don't understand the date, April—it is dated "April 13th, as of July the 1st." What does that mean, sir?

Q. I will ask—we will go into that in just a moment.

A. I don't recall it, I would have to refer to records, sir.

Q. Would your records reveal that we shipped to you somewhere around 3,511 pounds of polyethylene, equivalent to 780,000 bags of double oh one five poly, five by eight, printed two colors, green and white, radishes?

A. They might. I would have to refer to them. I don't know.

Q. Are your records here?

A. Yes, some of them are.

Mr. Abbott:

(Passing instrument to Mr. Wagner.) No objection?

Mr. Wagner:

Sure I object to it. I don't know what it is.

Mr. Abbott:

Well, Your Honor, I will have six others that I will have marked and introduced at a later time, by another witness.

The Court:

All right.

Q. What is the—have you figured out, as a—let's see, what did you say you studied in school, engineering and what else?

A. Cost accounting.

Q. Cost accounting. Have you figured out, as a cost accountant, what it costs you to make—rather, to convert 1,000 bags from film, printed film, into a completed bag?

A. Varies with the length of the bag.

The Court:

Speak out.

A. I'm sorry. It varies with the length of the bag, the quality and the type of the film, the amount of slit, whether it has an eye spot on it that the electric eye can pick up; it varies with about thirty different things.

Q. Well, assume just a five by eight—just give me some limitation.

A. I have never run a five by eight bag, sir.

Q. Five by twelve, five by eleven.

A. In what size run?

Q. I am just asking about the cost on a thousand bags, if it were in a run of one million, what would it cost, average?

A. You mean just direct labor, sir?

Q. Direct labor.

A. With a skilled operator operating two machines, you ought to be able to get it down to—just direct labor, without scrap, without overhead, machine time or anything else, in the neighborhood of fifty cents, fifty or sixty cents.

Q. Neighborhood of fifty or sixty cents?

A. That's right.

Q. Could be less, could be more?

A. And as a matter of fact, on the invoice that counsel inquired of Mr. Eliason about, you were allowed a dollar a thousand for that purpose, were you not?

A. I haven't seen the invoices.

Q. Well, they are in evidence (passing instrument to witness).

A. Check.

Q. You were allowed a dollar a thousand?

A. Right.

Q. For converting these bags, and your cost was somewhere in the neighborhood of fifty or sixty cents?

A. That is my direct labor alone, that isn't apparent cost.

Q. All right. Now, Mr. Meyer, you wrote a letter to Vahlsing and a number of others of the people allied with him about the shortages.

A. That's correct. It is a black photostat.

Q. Now, in this letter I read to the jury, that you have stated on July 23, 1954, when I understand that you were down in Elsa,—

A. No, sir.

Q. Where were you?

A. I was in New York.

Q. You were in New York.—that you had a—that you were checking on the short count by weight and quantity of polyethylene bags currently in your sheds. "There has been a short count from many of our suppliers and we want to accurately verify this fact before we arrange for any refunds or adjustments of price."

A. Check. I'm sorry. Yes, sir.

Q. Obtaining refunds and adjustments of price because of shortage from everybody seems to be quite a specialty of yours.

A. You said that. I didn't, sir.

Q. Is that correct?

A. No. You ought to know Vahlsing better than that.

Q. I beg your pardon?

A. Excuse me.

The Court:

What was the answer? I didn't hear it.

A. No, sir.

Q. Well, now, you have made a very detailed scheme here to do all this checking with.

A. That's right.

Q. And you have constructed charts and so on for your use and other people's use for the same purpose?

A. No, sir.

Q. And you have constructed charts—

A. For that purpose and others; not for that purpose only.

Q. All right. I am glad you cleared me up on that.

A. Perfectly welcome.

Q. And you have also made some statements to some people, of some kind, which you admit, that there has been short counting?

A. That's right.

Q. And "We had to go to the Bureau of Weights and Measures." That is a limitation of what you say. So I say that this interest in this is virtually an obsession with you, isn't it?

A. No, sir.

Q. All right. Now, Mr. Meyer, in producing film of this type, what is the tolerance on it?

A. In whose?

Q. Well, on yours.

A. It is not available for publication, sir.

Q. Well, that is secret, isn't it?

A. Yes. Within our own plant, we maintain plus or minus one and a half.

Q. Well, now, I don't understand. I thought you said it was secret.

A. Within our own plant, we maintain that. If you sell it to a customer with a specification on it, he has a valid reason to reject that if he can find one eighth of an inch anywhere in the material, he can send the whole shipment back, that is the exact reason that most of the film suppliers refuse to publish their tolerances and confirm them in writing.

Q. And to confirm them in writing. Now, within your own plant, you are down to plus or minus one and a half?

A. Yes, sir.

Q. And that is much better than the other extruders. Some of them are even larger than you, isn't that correct?

A. Possibly.

Q. You have a much finer control and tolerance than they do?

A. I hope so.

Q. Now, is it possible that you do perfect work?

A. Nobody is perfect, sir.

Q. Now, Mr. Meyer, do you regard a charge that someone will short count you as a serious charge?

A. If it is not true, yes.

Q. And it is not one to be made just promiscuously?

A. No, sir.

Q. You have done that, haven't you?

A. I have not, sir.

Q. What is it that you have done?

A. I have said it to three outside customers with whom I was friendly at the time. I have made information available as to the general sales picture, to the group that were going to do the exclusive selling for Texas Plastics.

Q. All right, I just asked you if you thought it was serious.

A. Yes, sir.

Q. I didn't want to go any further on that. Now, you implied that there was something wrong with Mr. Borak's machinery up there in New York, he was having continuous troubles with his counters and so on.

A. I didn't imply it and I am not implying it. I said I could not say continuous because my visits were few.

Q. Well, have you ever stated that his difficulties might be through inattention or something of that kind?

A. I can't judge on so few visits.

The Court:

That wasn't the question.

A. No.

The Court:

He asked if you had ever stated that.

A. No, sir.

Q. Now, isn't it true that polyethylene printing and converting into bags, among a lot of converters, is of relatively recent years?

A. Seven or eight, yes, sir.

Q. And do most converters run into problems from time to time?

A. I don't know, sir.

Q. Well, you have never heard of it?

A. I have heard of it from some, but I don't even know the names of most of the converters.

Q. All right, sir, I will limit it to say do you know of converters that have run into problems from time to time?

A. Yes.

Q. And if they have had a situation where they cut their bag off too short, inadvertently, didn't measure out at exactly eleven and a half inches, but it was only eleven and a quarter, would you say that that was a malicious thing on their part, of wanton intent, to defraud somebody?

A. I don't know, sir.

Q. Now, it is possible that that could be in the operation of the machinery, isn't it?

A. No.

Q. Or in the operator?

A. No.

Q. What could it arise from?

A. Using a small size printing cylinder or putting too much tension on the film.

Q. But that is an operator, though, that is at the controls?

A. That is not an operator, sir, the contour of a printing cylinder is fixed, if you use a twenty four inch printing cylinder and you put a plate all the way around, when it hits the poly, the poly will come out about twenty three and three quarters inches long, and there is no way you can overcome that, there is a certain amount of inherent shrinkage to the material. It is the circumference of the printing cylinder

around which the plates are mounted, unless the tension is incorrect, and on a press as ours, there is no possibility of that type.

Q. On a press such as yours,—

A. That's right.

Q. Is yours electronically controlled?

A. No, sir, it is a different design.

Q. Well, now, as a matter of fact, problems in the manufacturing of this are common, are they not?

A. I don't know, sir.

Q. Well, have you had any?

A. Some.

Q. Well, what kind?

A. Some problems with the characteristics of the ink, some problems with any types of films, recently developed,—we do a lot of experimental work at the plant—but on standard material, bought from outside suppliers, few, if any, sir.

Q. Few, if any. Now, as a matter of fact, you have got—your bag machine is the latest type, you run a pretty good seal on it, don't you?

A. Sometimes.

Q. Do you ever miss?

A. Nobody is infallible or perfect, sir.

Q. Have you ever delivered bags that were not sealed at all?

A. Not that I can ever recall.

Q. Along the long seam?

A. Possibly a few here or there might have gotten by.

Q. You have had complaints from several sources about that, haven't you?

A. No, sir.

Q. From Max Lutz, for one?

A. I did not, sir.

Q. You have had reports of difficulty on your ink, haven't you?

A. I have not had reports, sir.

Q. What have you had?

A. We have had—a shipment going out to El Centro, California, where we had some difficulty with the ink sticking.

The Court:

With the what?

A. The inks sticking. The bags.

The Court:

Some complaints?

A. That's right, sir.

Q. That was a shipment of around a million bags, wasn't it?

A. It was a shipment of 440,000, sir.

Q. And how many of them were bad?

A. I believe we gave him full replacement on them.

Q. 440,000—

A. Yes, sir.

Q. —were bad?

The Court:

Maybe you gentlemen are fencing with one another here. In other words, you didn't intentionally send those bags out that way?

A. Oh, no, sir.

The Court:

And—I think he is trying to ask you, couldn't some of these things happen without operators intending—

A. Oh.

The Court:

—to have a short count, for instance?

A. This—sir, what happened in this case, the ink company—

The Court:

I am convinced now that your trouble there was unintentional, but couldn't people, other operators, including you sometimes, have a short count without intending to do it?

A. Yes, sir, on—

The Court:

Is that what your point is?

Mr. Wagner:

Yes, sir, that is my point, Your Honor.

The Court:

I just didn't want to take so long about this. I think you all have been fencing a little bit.

Q. Now, Mr. Meyer, you filed a complaint with the Bureau of Weights and Measures?

A. Correct, yes, sir.

Q. Against Roto-Lith, for short weight and short count?

A. I asked them to check the count of his bags, sir.

Q. The report that came in was on short weight, wasn't it?

A. I have no knowledge of their report, sir.

Q. That is not what I asked you, sir. I said the report that they have is that you wanted—you made a complaint on short weight?

A. May I see the report, sir?
Q. I don't have it. Your counsel had it.
A. I believe it is in evidence. I am not—

Mr. Wagner:
No, it was excluded, wasn't it?

Mr. Abbott:
It was excluded, Your Honor.

The Court:
Did you complain about short weight?

A. No, I complained about short count.
Q. Now, you had a conversation, then, with Dolan, and met him and intercepted a shipment of bags?
A. Yes, sir.
Q. At the Roto-Lith plant?
A. Right.
Q. You rode in the truck, I presume.
A. No, I rode with Mr. Dolan.
Q. You followed the truck down?
A. Yes, sir.
Q. Then what happened?
A. Let's see. We got to the Bureau of Weights and Measures, parked the trailer right along—
Q. Well, you unloaded the boxes, didn't you?
A. Yes.
Q. And you weighed them and marked them?
A. Mr. Dolan weighed them.
Q. All right, Mr. Dolan weighed them and marked them. And ultimately, 23 or 24 boxes were counted?
A. All of them were counted, sir.
Q. Ultimately, that is true, ultimately, but at that time, or shortly thereafter,—

A. Initially.

Q. —there were a number of them counted?

A. Right, sir.

Q. And you found a certain percentage of short bags?

A. I didn't. They did.

Q. I will try to be more explicit, sir, in the future. The Bureau found a certain percentage. The Bureau then called in Mr. Borak, if you know, is that correct?

A. I don't know, sir.

Q. For a hearing?

A. I don't know, sir.

Q. Did you attend the hearing?

A. I did not, sir.

Q. You don't know what transpired at it?

A. I do not, sir.

Q. You do know that after that hearing, all 257 boxes were counted by the Bureau?

A. I saw the report, sir. I don't know from my own observation.

Q. Well, I don't want to quibble with you, sir. You know that there was a report made and showed a shortage.

A. That's right, sir.

Q. Quite distinct from the original?

A. Yes, sir.

Q. Now, Mr. Meyer, I have here what is marked Plaintiff's Exhibit No. 2, a letter addressed to F. H. Vahlsing, Incorporated; do you recall sending that?

A. No, sir, I never saw the letter.

Q. Were you in New York at the time?

A. Yes, sir.

Q. And you never saw this letter?

A. No, sir.

Q. Well, let me read it to you. "This is to confirm conversation—" this letter is dated August the 19th.

A. That's right.

Q. "This is to confirm conversation of August 19, 1954, at 11:45 a.m., with your Mr. Fred Meyer, who gave me the completion of his investigation of a thorough check covering our bill of lading of August 2nd, our invoices No. 4115 and No. 4116. Mr. Fred Meyer claims that invoice No. 4115 calls for 385,000 carrot bags and that his estimate shows 3.76%, or a total of $153.00 short."

A. The figures sound familiar, sir. I would have to confirm them.

Q. Well, that is the report. These figures sound familiar?

A. Yes, sir.

Q. Well, perhaps, in a bit, we can get out the actual figures that you had and refresh your memory. Now, Mr. Meyer, when was the first time that you saw Max Lutz after you received this citation in this suit?

A. That evening, sir, I believe, or possibly the following one.

Q. And when was the next time that you saw him?

A. I don't recall seeing him again until the next fall, sir.

Q. You don't?

A. No, sir.

And—wait. He gave me some cantaloupes in June.

Q. He gave you cantaloupes in June?

A. That's right.

Q. But after you went to see him the night after the citation, you didn't see him again until the cantaloupes came along in June?

A. I don't recall, sir. I doubt it.

Q. If you stated that you had been to see him in the meantime, then your present statement would be wrong?

A. It would be—my recollection would be incorrect, sir.

Q. All right. Do you recall making a statement to this effect, that Max Lutz had called you and that Mr. Cox had called Max Lutz relative to an affidavit?

A. Wait a minute. I don't recall that, sir. I may have made it.

Q. You may have made it?

A. I may have made it. I don't recall it.

Q. And that affidavit was to the effect—now this is Mr. Lutz' affidavit—that you had called Mr. Borak the terms that are cited in the citation, that were read to you a little while ago?

A. Is this Mr. Lutz talking to me or—

Q. I am asking you if you made these statements.

A. In a telephone conversation?

Q. That's right.

A. I believe I did. I may have. I am not sure, sir.

Q. All right, and then did you say that you went over and spoke to Max about it?

A. I said I saw him the night or the night after I received the citation, sir.

Q. I am talking about a statement that you made that you saw him two weeks after that.

A. I might have, sir. I don't recollect.

Q. Then—

A. I might have gone over, sir. I might have talked to him about that on the phone. I don't know definitely.

Q. Do you know what you did on that occasion when you went over, if you did?

A. No, sir.

Q. If you said that you—or did you apologize to him?

A. To whom?

Q. To Max Lutz.

A. I apologized the night I said I saw him, when I received the citation.

Q. Now, I am talking about on the occasion two weeks later.

A. I don't recall that occasion so I can't recall what I did, sir.

Q. All right, but if you said "I apologized—" Now, this is relating to a conversation two weeks after—

A. Yes.

Q. Well, what did you apologize for?

A. I apologized for being stupid, for making statements that were derogatory about an individual, which I never should have done; I apologized, and you will note, to Mr. Burt Benson and to Mr. Edd Boler and stated in each apology that if anything I had ever said could be misconstrued as implying that Mr. Borak was a crook or a thief, I sincerely apologized, because I never intended that that be implied and I had never said it, I admitted what I had said and I apologized for saying that too.

Q. In other words, you apologized for everything—if anything that was in that citation, if you had implied that,—

A. That's correct, sir.

Q. —that you had not intended to, so you made an apology?

A. That's right, sir.

Q. So you must have had something to apologize for, didn't you?

A. No.

Q. You didn't?

A. You can mean a great many things by that.

Q. Well, now, let's go back to the meeting that you remember with great clarity, the night you got the citation, when you went to Mr. Lutz' house, what happened on that occasion?

A. I went over to Mr. Lutz' house; his wife was home and I asked here where Mr. Lutz was. She told me "Down the shed" and I went down to see him. I explained what had happened and I asked him what I should do, the first time I had ever been sued or anything like that, had no experience or no knowledge, and he told me to tell Mr. Vahlsing everything that had happened, which I intended to do.

Q. I beg your pardon?

A. Excuse me, sir. He told me to tell Mr. Vahlsing the truth, everything that had happened.

Q. Well, now, how did this conversation come up, didn't you tell him that you were going to lose your job over this thing, that—

A. I bet him afterward that I would lose my job, I bet him a steak dinner.

Q. And it was right at that time, in that conversation, wasn't it?

A. Yeah. I'm sorry, sir. Yes, sir.

Q. All right. And you told Max or Max told you that you ought to go tell Mr. Vahlsing about it?

A. That's right.

Q. And did you say that you were going to make a clean breast of the whole thing?

A. I did, sir.

Q. And that you had told people about the short count?

A. That's right, sir.

Q. And that you thought you were being honest and ethical in doing it?

A. That's right, sir.

Q. And did I ask you, or have you been asked if Mr. Vahlsing is fully aware of what has happened?

A. I don't follow, sir. Who asked me what?

Q. I asked you if you were asked by me at any time—

A. I don't recall.

Q. —if you were—if Mr. Vahlsing was fully aware of what had taken place down here?

A. You may have. I don't know, sir. If it is there in the deposition, then you did ask me.

Q. Now, as a matter of fact, you even knew that this matter that had come up was going to get Mr. Vahlsing in trouble, didn't you?

A. Well, he owns the company and the lawsuit involves him as well as me.

Q. And you knew that Mr. Vahlsing had, prior to that time, been sued for slander the same as you and Mr. Vahlsing were sued this time?

A. The exact same words, yes, sir.

Q. Yes, sir, and you knew it, didn't you?

A. Yes, sir.

Q. And you were an employee of Mr. Vahlsing's?

A. That's right, sir.

Q. By any chance, did you choose and use his words?

A. Mr. Vahlsing never said those things. I was there, sir. Nor did I. Both charges are a lie.

Q. Well, I didn't understand you were there when Mr. Vahlsing—when this matter came up with Mr. Vahlsing; I understood that he was on his way out and just had five minutes to spend and that just he and Mr. Borak and—three minutes, it was—and Mr. Segel were there; I didn't know that you were present.

A. The office isn't that large, sir. It is a small office, in New York. I was in the office.

Q. You were right there?

A. Not right there. I was in the office.

Q. Were you in Mr. Vahlsing's office?

A. Either inside or just outside, sir.

Q. At the time?

A. I think I was at—Mr. Vahlsing—wait a minute. No, I was inside the office. I was waiting to talk to Freddie on something.

Q. So you were there or thereabouts and you overheard the entire conversation?

A. No, I didn't, sir.

Q. You didn't? So then, in fact, you don't know what happened, do you? You just said you did.

A. I never heard Mr. Vahlsing call him a crook or a thief.

Q. Well, then, you don't know what was said there.

A. I heard him say he had to get out to the island, he had some buyer he wanted to—

Q. Well, were you there or were you not?

A. I was there, sir. I didn't hear every word of—

Q. When Mr. Borak and Mr. Segel were there?

A. I never saw Mr. Segel. I saw Mr Borak. I still don't know who Mr. Segel is.

Q. Well do you know Mr. Joseph?

A. No.

Q. Well, he is an attorney from New York.

A. So I have heard, sir.

Q. And you don't see him here, do you?

A. I don't know him. He might be that gentleman there.

Q. Well, it is not that gentleman there. Well, now, did Max suggest that you tell the truth about this to Mr. Vahlsing?

A. I just told you he did, sir.

Q. And what happened?

A. I had every intention of doing that, and I did.

Q. You told him all about it?

A. I did, sir.

Q. Now, I want you to state again for us the apology that you made to Edd Boler and Burton Benson.

A. I apologized to Mr. Lutz, Mr. Boler and Mr. Benson, if anything I had ever said in any way implied that Mr. Borak was a thief and a crook, because I had never intended that, the only things I had said to them were as stated, number one, that he short counted; number two, that he had to file a complaint with the Bureau of Weights and Measures; number three, that we were involved in a lawsuit, or litigation, with him.

Q. You made this apology—and that is what I wanted, not your statement—after you were served with this citation?

A. That's right, sir, yes, sir.

Q. And you enumerated these things that you said you had told them?

A. That's right, sir.

Q. In other words, you said them again?

A. That's right, sir.

Q. You wanted them to remember that you had said it just that way?

A. No, sir, I asked them if my memory was in error, or if the citation were correct.

Q. Well, now, did you tell them that it was all untrue?

A. What?

Q. The statements.

A. Which statements?

Q. That were alleged in the petition.

A. I didn't say they were true or untrue, but I am not here to—excuse me. No, sir.

Q. Well, now, did you tell them that what you did say to them was untrue?

A. No, sir.

Q. Now, you stated a little while ago, on direct examination, that it was untrue.

A. What did I state was untrue, sir?

Q. Those statements—

A. I never—

Q. —that you did make.

A. Excuse me. The statements that you said I made, I testified were untrue, and I still do. The statements I said I made, I still say are true.

Q. Now, what else did you tell them about when a man is your neighbor?

A. I told them that I had been living in a small town, called Patchogue, out on Long Island, and out there, we had a very funny code, if a guy is your neighbor, your friend, and you have been hooked, and you see he is going to get hooked, you tell him too.

Q. And that's what you did in this case?

A. That's right.

Q. They were going to get hooked and you were warning them. That is exactly what happened, wasn't it?

A. No, sir.

Q. I mean that was what you learned out in Patchogue, in Long Island?

A. Patchogue, sir.

Q. All right, sir.

The Reporter:

How do you spell that?

A. P-a-t-c-h-o-g-ue.

Q. Isn't that right?

A. That is continuing a train of thought. I never said that, sir. I said that where I lived, when I had been hooked and I saw a friend about to be hooked, I warned him. I did not leave them there and say that they were going to be hooked. That is what you said.

Q. And in that same conversation, you informed them again of the experience of Mr. Vahlsing?

A. Yes, sir.

Q. And yet you weren't even an employee of Mr. Vahlsing's and going around making these statements, were you?

A. I beg your pardon?

Q. I said you are not even an employee of F. H. Vahlsing, Incorporated, and yet you—

A. Can you qualify that, sir?

Q. I don't have to qualify it. I ask you the question. Are you?

A. An employee? Oh, I see what you mean. No, I am an employee of Texas Plastics.

Q. And yet you went around as an employee of Texas Plastics, telling about a corporation with which you had no connection whatsoever, isn't that right?

A. That is incorrect, sir. I was stuck with the short count on the printed rolls, those rolls were sold to Texas Plastics and we were stuck with a substantial short count on them.

Q. If all of the invoices show that they were sold to Vahlsing Agricultural and Insecticide Corporation, or F. H. Vahlsing, Incorporated, how could it be that they were sold to you?

A. F. H. Vahlsing Insecticide or Agricultural or anything else can take the receipt from Mr. Borak,

as Mr. Vahlsing explained, they were transferred to my plant and invoiced to my plant as one of the F. H. Vahlsing corporations, to have them made into bags, and we were to back-charge him when they were made into bags, and we were stuck for a substantial short count on that system, sir.

Q. And your complaint, then, would be to the one who had transferred it to you, the F. H. Vahlsing, Incorporated, would it not?

A. Complaint? No, it is a mutual problem.

Q. I am trying to get the clear distinction, sir, that you were not employed by F. H. Vahlsing, the one who bought the bags from Borak, and that is correct?

A. That is correct, sir.

Q. And you undertook to make the statements that you did, whatever they were, relating about "we" had this experience?

A. That's right, sir.

Q. And it wasn't you at all, was it?

A. No, sir.

Q. All right. Now, you recall on one occasion my asking you if you had made your statement substantially implying that you had to sue Mr. Borak to get your money back because of the short count on bags?

A. That's right, sir, and I told you I didn't recall ever saying it, that it was untrue and therefore I doubted if I had ever said it.

Q. Well, you said it was possible, didn't you?

A. When?

Q. At the time I asked you around April the 15th,—

A. Right.

Q. —1955?

A. Anything is possible unless I recall to the contrary, sir.

Q. Well, you don't recall that you did tell them that?

A. Sure.

Q. All right, and you heard them say that you did?

A. Yes, sir.

Q. All right.

A. Sir. Mr. Abbott. In—

Q. Mr. Wagner will ask you the questions, unless I get on the stand. Now when you—the occasion that you got this citation, you went over to Mrs. Lutz?

A. That's right, sir.

Q. And you told her what?

A. I was in trouble, where could I find Max.

Q. You told her you were in a lot of trouble, didn't you?

A. I don't remember if I said a lot or just in trouble, sir.

Q. Well, let's find that. On or about—in April, 1955, shortly after this thing occurred, did I ask you if you went by to see Mrs. Lutz,—

A. Yes.

Q. —and you said, in substance, that you—it was Ruth Lutz?

A. That's right.

Q. Ruth?

A. Yes, sir.

Q. And didn't I ask you if you told her that you were in trouble, and you answered "Yes"? At that time, it was fresh in your memory, this was only—

A. I don't recall the exact words, sir. I don't now, and I probably didn't then, and I couldn't tell you where the punctuation marks were, either. I don't remember exact conversations of over a year ago.

Q. I see. And you don't—as you indicated a moment ago, after two weeks, you have to write it down?

A. That's right, sir.

Q. So you are not really sure what you did say to Edd Boler and Burt Benson—

A. I am, sir.

Q. —and Max Lutz—

A. I am, sir.

Q. —and Bob Blackwell and Levermann and Fullick?

A. Oh, yes, I am, sir.

Q. You are positive about that, aren't you?

A. I am positive about the fundamental facts of what I said. I am not positive about a casual conversation.

Q. In other words, you analyzed what you wanted to say before you said it?

A. I didn't say that, sir. You did.

Q. I am asking you the question.

A. I only stated the facts, and the facts were those.

Q. Mr. Meyer,—

A. Yes, sir.

Q. —I would like to do some computation with you. You are a cost accountant and I want to work out—

A. Excuse me. I said I studied them. I didn't say I was one.

Q. May I have a pad of paper? On a five and three quarter by eleven and a half, printed, two color, green and white, fresh vegetable carrot bag of double oh one five poly, how much, in—(conferring with witness, out of hearing of the reporter).

The Court:

I'll tell you what I am going to do, I am going to recess for a while. I was in hopes we could get through, but I have worked you awful hard on it. How many of you jurors would it inconvenience to come back in about an hour, for a night session in this case? Can you do it without being a hardship on you? It is an important case, of course, from the standpoint of the parties on both sides, and I don't want to rush either side too much.

Juror:

Why can't we put it off 'til morning, sir?

The Court:

Well, I have some cases at Corpus Christi Friday and I have got citizenship ceremonies here tomorrow afternoon. I hate to impose on you that way. Mr. Reporter, let me talk with you a minute.

(Conference between the Court and the Reporter, at the Court's bench, off the record and out of hearing of the jury.)

The Court:

I had told the reporter—the reason I was conferring with him, I had told the reporter that positively we would be back in Corpus Christi Friday and I wanted to check with him. I don't want to impose on the jury, I don't want to impose on the parties, I don't want to impose on the attorneys. I happen to know that one of them is not in good physical condition, one of the attorneys, and I don't believe we ought to knock ourselves out, any of us. I have been working pretty hard myself. I left the office last night

at nearly 8:00 o'clock, after you all were gone, I believe, around 5:00. So I am going to recess over until 9:00 o'clock in the morning and I want to apologize to you for keeping you this late. I was just in hopes that we could complete this thing. I will cancel what I have got in Corpus Friday. I just want to be sure we can hear all the testimony and close this case, arguments and so forth, Friday. I am going to work you hard tomorrow, now, all of you, so don't discuss the case in the meantime, don't let anybody discuss it in your presence, and we will be back at 9:00 o'clock n the morning. The jury may retire quietly.

(Whereupon, at 6:50 p.m., May 23, 1956, Court was recessed until 9:00 a.m. of the following day.)

Morning Session—May 24, 1956.

The Court:

Ladies and gentlemen, I am sorry about the delay this morning. The reporter didn't get here, as you probably know. I have had no information from him, but I do know that the parties, after you left last night at seven, ordered a transcript of some of the testimony that was taken yesterday, and I imagine he has been working most of the night. For your information, I was in my office at 6:00 o'clock this morning too. I have been here ready to open Court since 9:00. All right. Come back to the stand. Are you through with Mr. Meyer?

Mr. Abbott:

No, sir, we have some more questions we would like to address to him.

The Court:
All right.

FRED J. MEYER, continued his testimony as follows:

Cross Examination (Continued).

By Mr. Abbott:

Q. Mr. Meyer, we want to resume our testimony from the point where we left off last night.

A. Yes, sir.

Q. Mr. Meyer, didn't you bet Max Lutz a steak dinner that you would lose your job because you knew you had made false and slanderous statements concerning Roto-Lith and Harry Borak?

A. No, sir, I didn't. You will have to rephrase that question.

Q. I just want an answer—do you want me to restate the question?

A. Yes, sir. I can't answer it as is.

Q. All right, I will restate it. Didn't you bet Max Lutz a steak dinner you would lose your job because—

A. Yes to that.

Q. —because you knew you had made false and slanderous statements concerning Roto-Lith and Harry Borak?

A. No, sir.

Mr. Abbott:

Your Honor please, I would like to read from the deposition of Mr. Meyer, on page 91.

Q. Now, your deposition was taken in this case?
A. Right, sir.
Q. On or about April 15, 1955?
A. Right, sir.
Q. And you were under oath at that time, were you not?
A. I was, sir.
Q. All right. Starting on line 10, on Page 91 of the deposition,—I start at line 8, with the question. "Did you also tell him—" referring to Max Lutz—"—that Mr. Vahlsing had heard about it and he was coming down here?

"Answer: No, I said I was going to Mr. Vahlsing and make a clean breast of the thing, that I had told people about the short count, that I thought I was being honest and ethical in doing it, that I was not selling. I could not sell, that I said—well, my personal feelings with Mr. Vahlsing were such—I had no contact with him, shook hands with him and went to work with him and moved my family down here just on that trust of the man. I happened—"

A. That's right.

Q. "I happened to like him and respect him more than any man I have known in a long time."

Mr. Wagner:
No "and I have."

Mr. Abbott:
Oh, changed?

Mr. Wagner:
I was changed.

Mr. Abbott:
If it was changed, all right, excuse me.

Q. "—have known in a long, long time, and that includes vice presidents of Celanese and Johnson & Johnson and everything else. I didn't want to get him in any trouble and I bet Max a steak dinner I would lose my job or have to pull out because of it.

"Question: Did you mention you might lose your job over this matter?

"Answer: Yes, I was willing to give it up in order to protect Mr. Vahlsing." Isn't that—

A. Sure.

Q. Now, Mr. Meyer, about two weeks after you apologized to Mr. Borak at the Casa de Palmas, did Max Lutz tell you that Mr. Cox had called him to sign an affidavit to the effect that you had made the utterances set forth in complaint in this case?

A. I don't recollect, sir. He may have.

Q. I refer you now—I would like to read from the deposition on page 86.

Mr. Wagner:

May I hear that question and answer? I didn't quite understand that.

The Reporter:

"Now, Mr. Meyer, about two weeks after you apologized to Mr. Borak at the Casa de Palmas, did Max Lutz tell you that Mr. Cox had called him to sign an affidavit to the effect that you had made the utterances set forth in complaint in this case?

"Answer: I don't recollect, sir. He may have."

Q. Now, then, it is perhaps true that you wanted—that you got a call or you went to tell Max Lutz about this and you wanted to apologize for it?

A. I don't follow that, sir.

Q. Well, I will restate the question. Mr. Lutz did tell you that Mr. Borak wanted Max Lutz to come over and sign an affidavit?

A. Mr. Borak told me?

Q. No, sir, Mr. Lutz told you.

A. Yes.

Q. That Mr. Cox wanted Mr. Lutz to come over and sign an affidavit to the effect that you had made the utterances set forth in the complaint in this case.

A. I don't recollect now.

Q. You don't recollect?

A. No, I don't, sir.

Q. But it is possible that he did tell you that, isn't it?

A. It is, and it is also possible he didn't. I don't recollect.

Q. All right. Now, referring to page 86 of your deposition, line 21, starting with the word "I," it reads, "I received word about two weeks later from Max Lutz that Mr. Cox had called him relative to an affidavit that I had called Mr. Borak the terms that are cited in the citation. I went over and spoke to Max about it. I apologized, if anything I had said had implied that, I had not intended, and I thanked him for a very good lesson in salesmanship." That is through line 1 on page 87.

Mr. Wagner:

Well, Your Honor, we offer the rest of the answer. Why should he cut off in the middle of the man's answer?

The Court:

All right.

Mr. Wagner:

"I thanked him for a very good lesson in salesmanship, in keeping my mouth shut when I thought I was doing a man a favor, because he was a neighbor of mine, and that in reality, was putting my neck out, and Mr. Vahlsing's. I went over and apologized to Burt Benson and to Edd Boler, telling them if anything such was implied, it had not been intended. I explained to each of the men I was raised in a little town, village, called Patchogue, and out there, when a man is your neighbor and you have been hooked by somebody, you tell your neighbor about it in order to protect him. Mr Vahlsing warned me when I came to Texas, 'always tell the truth, never tell a lie, and never fail to live up to a promise.' I followed that down here, and in accordance with that precept, I informed these three gentlemen of what I had experienced with Mr. Vahlsing. I apologized to them for ever opening my mouth and for the worst lesson in salesmanship that I had ever received."

Q. Now, Mr. Meyer, did Mr. Lutz ever tell you that Mr. Cox had affidavits from five different people concerning your false statements?

A. No, sir.

Q. He did not?

A. I don't recall him ever telling me.

Q. You answered "No, sir"?

A. I don't recollect, sir.

Q. All right. Now, referring to page 88 of your deposition, starting with line 23, "Answer: Because Mr. Lutz had told me that Mr. Cox was in the possession of several affidavits from different people,—"

A. Several isn't five, sir.

Q. Just a moment. I will re-read that. "Because Mr. Lutz had told me that Mr. Cox was in the possession of several affidavits from different people, five different people. I knew I had not spoken to five. I spoke to three, apologized to them. They told me they did not want to become involved in the case and they had no interest in it whatsoever." Now, the witnesses that you spoke this to said they had no interest in the case whatsoever.

A. That's correct.

Q. All right, Now, Mr. Meyer, didn't you tell Max Lutz that you thought it was ethics and decency to tell people of a short count?

A. Yes, sir. Sir, friends, not people.

Q. Reading from your deposition on page 90, on line 8, this is relating to your discussion with Max Lutz, "Question: And what did you tell Max?

"Answer: I sat down and stated just what I knew about it, and I asked him what he could do, what I should do. I never came across anything like this before, where did I go from here; I was acting in what I thought were ethics, decency, telling people of a short count." Now, do you say anything in that statement about telling friends of a short count?

A. Nor, sir.

Q. All right, telling people.

A. Well, friends are people, are they not?

Q. Well, have you told any people—

A. I told three.

Q. Just a moment, please.

A. Excuse me, sir.

Q. Have you told many people that they would wind up paying more to Roto-Lith than they would to you because Roto-Lith would give them a short count?

A. I told three friends. No people in general.

Q. All right. Now, I refer you to page 96 of your deposition, starting with the question on line 12, "Did you ever tell anybody that if they dealt with Roto-Lith, that 'You will wind up by paying more to them than you will if you buy from me, because they will give you a short count'?"

Mr. Wagner:

What page are you on?

Q. I am on page 96. "Answer: I have told many many people, 'Don't look at the first price, that isn't the final price; your cheapest first price may cost you the most in the long run because of short count, thin guage and bad bags'.

"Question: And you have given Roto-Lith as an example?

"Answer: I have not given them as an example of that. I said Mr. Vahlsing, in previous years, bought from Mill Print and Shalimar; last year he bought from several smaller concerns because the price was lower. He found the bags cost him more in the long run. We have had difficulty with Mr. Borak because of a short count." Now, in telling these many people that you related to, it was because of this Borak matter, wasn't it?

A. It was not, sir.

Q. Why, as a matter of fact, that was the first experience you had had in this business, when you came into it, wasn't it?

A. I am afraid I don't follow you, sir.

Q. As a matter of fact, when you went to work in the bag industry and you started telling people about short count and short weight and so on, you

had just gone to work for Mr. Vahlsing, hadn't you; prior to that time, you were a technical consultant and a liaison engineer and so on?

A. I had come to work—yes and no, sir. I can't answer that directly, the way it is worded.

Q. Well, now, didn't you tell Max Lutz and Burt Benson and Edd Boler that Vahlsing had to sue Harry Borak or Roto-Lith in order to get their money back?

A. I have told you before, I did not.

Q. You did not. Now, I refer you to page 94 of your deposition, in which you were talking about these three gentlemen.

A. That's right.

Q. Starting at line 22. "Now, at any time, in talking about these three people, did you ever tell them that Vahlsing had to sue Harry Borak or Roto-Lith in order to get their money back?

"Answer: Said we were involved in a lawsuit.

'Question: 'Before we could get our money back'?

"Answer: Yes."

A. Will you phrase the reading again? I am—

Mr. Wagner:

Well, it is all right.

A. It is?

Q. "Answer: Yes. I also said we had—

"Question: What is your understanding of the implication of these words; that you had to sue them, is that not right?

"Answer: I suppose it could be that."

A. And it could be that.

Q. The answer in the deposition was, "I suppose it could be that."

A. I suppose.

Q. All right.

Mr. Wagner:

May I ask—offer the next question and answer, while it is fresh?

"Question: Well, is it that?

"Answer: Actually, we were sued."

Mr. York:

If the Court please, we ask that counsel introduce this evidence on his case.

The Court:

No, that is all right, I think it is better to get the context, rather than—

Q. Now, Mr. Meyer, isn't it true that you made these slanderous and false statements about Roto-Lith and Harry Borak because of the competition that he gave you down here?

A. I never made slanderous statements, sir, so I can't answer the question.

Q. You deny that the things that you said were—

A. I deny that.

Q. —slanderous?

A. I deny that, sir.

Q. And what kind of competitor is he down here, is he clean, up and above board?

A. I don't sell to that extent. I don't know, sir.

Q. Well, you don't know that he isn't clean and up above board, do you?

A. No, sir, I can't vouch for him either way.

Q. Well, with regard to his business tactics, he talked to you in the hotel room about what was good ethics in salesmanship, didn't he? You know his thoughts on it, don't you?

A. I know his actions, too.

Q. Yes, you do, in regard to business tactics,—

A. No, in regard—

Q. —and they are good?

A. —to Mr. Vahlsing, sir.

Q. I beg your pardon?

A. In regard to Mr. Vahlsing. He talks clean and he short counted.

Q. All right. Now, Mr. Meyer, didn't you state in your deposition that you had told Max Lutz about the short count and everything else?

A. I guess I did. I don't recall the exact words. You have it there, sir.

Q. Well, I want to ask you the question again, didn't you state in your deposition that you had told Max Lutz about the short count and everything else?

A. I don't recall the exact words "and everything else." I told him about the short count.

Q. Do you want me to read it to you?

A. Yes, sir, please.

Q. All right, page 90 of the deposition, starting with line 21, "Answer: I had spoken to Max several times in regard to bag problems, and on this conversation in which I asked him for advice, on the legal aspects, since I have no knowledge of that profession whatsoever, this was after I had made any previous statements to him about the short count and everything else."

A. Yes, sir. Then evidently I did say it.

Q. All right. Now, was this before the complaint was served, these statements that I have just referred to?

A. It couldn't have been. It was nearly a year later, wasn't it?

Q. I am talking about the citation in this action.

A. Oh, I am sorry. It might have been. I recall telling Max about the short count the Bureau and the lawsuit, before the citation and after the citation, as well, and when I referred to "everything else," it was the lawsuit and the violation and the Bureau. That is what is "everything else."

Q. You limit it now to those things as being everything else?

A. Oh, it could include the weather, too.

Q. You weren't talking about the weather when you were upset on that occasion and going to him for legal advice?

A. I might have. I don't recollect.

Q. All right, sir. Didn't you admit to Max Lutz that you had said those things that were set forth in the complaint?

A. I never admittted and never said it, sir.

Q. And you didn't admit it to Max Lutz?

A. I admitted it to no one and I have consistently denied it.

Q. All right, referring to page 92 of the deposition, and this follows the immediate conversation we were talking about where you said "And everything else,"—

"Question: And you also told Max that you had said those things, and 'what can I do about it?'

"Answer: That is right."

A. Said what things, sir? "Everything else," and said things. I don't know what you are referring to.

Q. You were talking to Max about the complaint?

A. Right.

Q. And you were talking to him about the short count and everything else. Now, I will rephrase the question.

A. All right.

Q. "Question: And you also told Max that you had said those things, and 'What can I do about it?'

"Answer: That is right." Is that correct?

A. I said we had been short counted—

Q. All right, your counsel will go into that.

A. Okay.

Q. Your deposition will go into the record here. Well, now, didn't you make the same statements about Roto-Lith and Harry Borak to Edd Boler and Burt Benson, over a period of two nights, and to Max Lutz?

A. I have already told you that I did, yes, sir.

Q. All right, you made the same statements—

A. Not these—

Q. Now, let me ask you a question. On page 92 of your deposition, starting with line 5, did you testify on your deposition as follows, "Question: Did Max suggest that you tell the truth about it and to Mr. Vahlsing?

"Answer: Which I did.

"Question: And you have told Mr. Vahlsing?

"Answer: Oh, God, yes." Is that right?

A. I told Mr. Vahlsing the full truth of what occurred, sir.

Q. Now, Mr. Meyer, isn't it a fact that you were so disturbed concerning your false and slanderous statements that you were ready to invoke the help of God in this matter?

A. Excuse me. I never made false and slanderous statements, sir, and I had just found out shortly before what a deposition was. I thought we were getting together to see if we had a case, and you will find that quoted in the deposition, too. It was the first time I had ever been in Court and I didn't know what one was.

Q. All right. Now, Mr. Meyer, was there a contract between Lone Star Bag Company and Texas Plastics?

A. I do not know, sir.

Q. You don't know?

A. No, sir.

Q. If there had been one on an exclusive sales agency or whatever it was, would that have been an important agreement?

A. Yes, sir.

Q. It would have been. Well, now, as a matter of fact, didn't you sign that contract on behalf of Texas Plastics—

A. I signed—

Q. —and wasn't it later added to by Mr. F. H. Vahlsing, Senior?

A. It was changed and never finally signed, sir.

Q. The original was signed, however, the original contract that was entered into by you, wasn't it?

A. And it was invalidated by Mr. Vahlsing, so that no contract—

Q. But you did enter into the original contract?

A. I can't enter into a contract—

Q. Beg your pardon, sir. You signed the contract,—
A. And Mr. Vahlsing—
Q. —is that right?
A. Right.
Q. And you testified in your deposition, heretofore, that there was no written contract?
A. If a contract is no good, there is no contract.
Q. I don't want you to explain—

The Court:
He didn't ask you that.

A. All right, sir.

The Court:
He asked you if you testified—

A. That's right.

The Court:
—what you testified before, on your deposition. I will decide whether there was a contract or not.

A. All right, sir.
Q. Now, wasn't the real purpose of your testifying on your deposition that there was no contract, was to hide the fact that you had the authority to play an important part in Texas Plastics and to execute an important agreement?
A. No, sir.
Q. All right. Now, Mr. Meyer, in your plant, do you buy the supplies from major Manufacturers over the United States?
A. Which supplies?

Q. Well, sir, I am talking about the raw products that you obtain to make your poly out of, and your bags.

A. There is only one raw product you use to make poly. Please be more specific, so I can answer specifically.

Q. All right, sir, you tell me how to be more specific and I will be glad to co-operate with you.

A. All right.

Q. What I want to know is, you buy supplies at your plant that ultimately develop into the printed product that your firm and organization sells, isn't that right?

A. That's true, sir.

Q. That requires a number of things,—

A. That's correct.

Q. —such as base product,—

A. Polyethylene.

Q. —polyethylene pellets, whatever those are?

A. That's right.

Q. Who do you buy those from?

A. DuPont, Bakelite, Kenneth E. Eastman, Spencer.

Q. Are those big companies?

A. Oh, yes, sir.

Q. Are they reputable people?

A. And how, sir.

Q. All right, sir. Now, then, is that the limit of the people that you buy from?

A. No, sir.

Q. Your baked product, that—

A. No, I was just referring to polyethylene.

Q. I am too, at this moment.

A. Pardon?

Q. I am too, at this moment.

A. Oh.

Q. I am talking about your pellets and flake, or whatever you want to refer to it as, is that the only companies that you buy from,—

A. Oh, no, sir.

Q. —or are there others?

A. There are others.

Q. Are they big manufacturers?

A. Oh, yes.

Q. People of good reputation?

A. Monsanto, Dowell.

Q. Good.

A. U. S. Industrial Chemicals.

Q. But they are people of good reputation?

A. Yes.

Q. Now, how about your boxes, do you buy those from reputable people?

A. Yes, sir.

Q. All right, now, what else do you have to use to make the bags? Ink?

A. Yes, sir.

Q. And who do you buy that from?

A. Several firms.

Q. Well, are they reputable people?

A. We don't deal with anyone else, sir.

Q. You don't deal with them unless they are?

A. Yes, sir.

Q. All right, sir. Now, I refer you to page 92 of your deposition starting with the word "Many" on line 24, which reads, "Many of our supplies have offered me kick-backs on the purchases of ra materials, that would have more than doubled my salary."

A. That's correct.

Q. Do you remember saying that?

A. That's right.

Q. And yet you now say that these are fine, reputable people, that you deal with?

A. You did not ask for suppliers of film, sir. You asked an entirely different question. That's why you were talking about when you said "supplies".

Q. I am saying that "Many of our suppliers have offered me kick-backs on the purchases of our raw materials."

A. Film is also raw material.

Q. All right, make the qualification, sir, but isn't it true that you will say just about anything about anybody?

A. That is a lie, sir.

Q. All right.

Mr. Wagner:

May I read the rest of that answer right at this time?

Mr. Abbott:

Well, I would prefer that he go into it later, Your Honor.

Mr. Wagner:

Well, Your Honor, I would have to bring the jury all the way back to it again.

The Court:

No, I will let you read it now.

Mr. Abbott:

All right.

Mr. Wagner:

"I wrote to Mr. Vahlsing about it, if he was willing, I would accept the checks and indorse them to him. He refused to have any such dealings."

Mr. Abbott:

I beg your pardon. That is an interlineation in the deposition,—

Mr. Wagner:

That's right.

Mr. Abbott:

—and it is not contained in the reporter's transcript that I have.

Mr. Wagner:

All right. "Personally, I have never had anything tied my name with anything of that type and I would rather not, because as far as I am concerned, if I don't deal on the up and up with a man—I told Mr. Vahlsing about it, when I do this consulting work on the outside—it is done in my spare time and any fees that may accrue to to Mr. Vahlsing. I don't want any of it."

Q. Now, then, sir, you heard Mr. Edd Boler testify that you called Mr. Borak a crook. Was Edd Boler lying?

A. I would have to hear the exact record on it, sir.

Q. Well, you were present—

A. That's right.

Q. —in the Courtroom, sir, and heard him testify.

A. That's right.

Q. And he testified that you had called Mr. Borak a crook.

A. That's right.

Q. Now, was Edd Boler lying?

A. He might have been mistaken.

Q. You won't say that he was lying, will you?

A. No.

Q. Okay.

A. I have never accused Mr. Boler—

Q. All right.

A. —of being a liar.

Q. All right. Now, yesterday,—I will go into another matter at this time. How many accounts does Texas Plastics sell?

A. I don't know, offhand.

Q. Well, just a guess, in round numbers, is it ten thousand or—

A. Oh, golly, no.

Q. A hundred?

A. Less than a hundred.

Q. Less than a hundred?

A. Sure.

Q. And how many of those accounts that you have are what you call current, that is regular paying accounts.

A. Almost all of them, sir.

Q. Almost all of them?

A. I don't know of any exceptions.

Q. All right, and how many people that buy carrot bags owe you over $25,000?

A. There are very few people who buy that many in a year.

Q. Well, not very many owe you more than that, do they?

A. They don't buy that many.

Q. All right.

A. They couldn't.

Q. Do you know of anybody that buys more than that in a year?

A. Yes, sir, A & P, F. H. Vahlsing and Max Lutz are the only—and the whole series of Nash-Finch.

Q. And F. H. Vahlsing, that is one of the concerns of which you are either the primary or a subsidiary, I don't know which, is that correct?

A. I believe so.

Q. Now, you have, at present, somewhere around $28,906.73 outstanding to Max Lutz, don't you?

A. I don't know. If that is the figure you have, it must be right.

Mr. Abbott:

Well, at this time, I would like to have him read this letter (passing instrument to witness).

A. I said twenty five to twenty seven, was my estimate yesterday.

Q. You did, sir, and this is only twenty eight, twenty nine, isn't it?

A. That's right.

Q. All right. Now, you authorized the extension of that credit to Max Lutz,—

A. I did, sir.

Q. —in that amount? Well, who authorized the extension of twenty eight, twenty nine thousand dollars worth of credit to Max Lutz?

A. There is no authorization at all, if a man pays in roughly thirty days, he has got that credit as long as he keeps paying. He has paid us approximately $50,000.00 already on his account.

Q. Well, when did you start extending Max Lutz that kind of credit?

A. I couldn't say. I don't recall extending it.

Q. Let me ask you a question now. Let me ask you a question. I want to talk to you a little bit about what you have said about Max' credit heretofore.

A. All right, sir.

Q. Referring to page 72 of the desposition,—

A. That's right.

Q. —and this was in May of—or this deposition was taken in April of 1955, and it relates to conversations you had been having with Max Lutz.

A. Right, sir.

Q. Starting with an annwer on line 4, it reads—and the "he" in this occasion is Mr. Lutz—"He wanted to know if Mr. Vahlsing would okay his credit. Max is a very fine gentleman, as you know, but he has had a good bit of financial difficulty. Mr. Vahlsing said he would not accept any outside orders. They had to go through Lone Star."

A. That's right.

Q. "Mr. Vahlsing was sick at the time. I spoke to both Mr. and Mrs. Vahlsing. This was on a Wednesday or a Thursday and Max needed bags the next Monday. At that time, I took money out of my own pocket and brought his plates, so that if I could wrok the deal, he would have the bags in time." The deal is the credit, isn't it?

A. It is not, sir. You proved my point, not yours.

Q. All right, "If I couldn't, I was out two hundred dollars, just as a friendly gesture, to give him every possible insurance." Now, the point of this was that Max was in a good bit of financial difficulty, wasn't he?

A. With us, sir, or with other people?

Q. With other people.

A. I don't know about his accounts with other people.

Q. Well, then, was he in a good bit of financial difficulty at that time with you?

A. We had never sold him anything, so—

Q. Well, what—you had never sold him anything?

A. At that time. We hadn't gotten his plates yet.

Q. And you did go ahead and sell him?

A. After that?

Q. Yes, sir.

A. When Lone Star accepted his credit. It had to go through Lone Star.

Q. All right. Now, I refer you to page 84 of your deposition.

A. All right.

Q. This is on line 3, an answer of yours, saying, "Look, Mr. Lutz is a friend of mine. As far as he is concerned, he wants my little boy over at his house and my little boy is to call him Uncle Max. The man had some financial reverses in the past, as you probably know, and he is in serious credit difficulties." Those are your words.

A. At what time was that stated and in regard to what, sir?

Q. Well, it is in regard to your conversations and your knowledge of Max Lutz and his serious financial difficulties.

A. At what time, sir? Before we started selling him, if Lone Star had—

Q. You let your counsel ask you at the proper time. Now, if I recall your testimony yesterday, you stated that you knew about bag making from Celanese and that you didn't need to learn from Roto-

Lith at all, that you had had experience, you had been up at this plant for three months, or wherever you were?

A. I didn't say I was anywhere.

Q. Well, in Brooklyn, wasn't there some plant—

A. That was not bag making, sir.

Q. All right, but you didn't—if I remember your testimony, you stated you knew about bag making and that you didn't go to Roto-Lith to learn how to make bags, but only to observe, is that correct?

A. That's correct, sir.

Q. Let me refer you to page 106 of your deposition. Now, during this conversation, we were inquiring about your visits to the Roto-Lith plant and I asked you a question, "You never did remove your coat and go in there and help them in any way?

"Answer: Helped them? I didn't know anything about the business."

A. That's right.

Q. "I was up there to get their advice." All right. Now, then,—

Mr. Wagner:

Now let me offer the rest of the answer, since you offered just part of it. "Help them? I didn't know anything about the business. I was up there to get their advice. When I checked other people in the field, I found that the advice they gave me was incorrect or deliberately misleading in regard to one particular application."

Q. All right. Now, then, Mr. Meyer, isn't it true that just prior to the alleged shortage that we have heard about here, of bags at Max Lutz' shed in

1955, that you were seen in the shed at midnight with Johnnie Snider, the boy that testified her yesterday?

A. That's a lie, sir.

Q. You were not there?

A. That's a lie.

Q. When were you there with him?

A. I was never there with Johnnie Snider, after we stopped selling bags to Max Lutz.

Q. You were there when they had Roto-Lith bags, with Johnnie Snider, at night, weren't you?

A. I was not there. I was there one evening—

Q. Johnnie Snider is a pretty good friend of yours?

A. He isn't.

Q. Is Max Lutz a good friend of yours?

A. Max Lutz is. Johnnie Snider is an acquaintance.

Q. All right. Now, when Mr. Snider testified that you were there one evening, when was that?

A. In the deposition, I was there one evening with Mr. Saul Perlman and Mr. Lutz, when Mr. Lutz called me, either at my home or at the plant, wanted me to meet Mr. Perlman, who was president of DuroPac, a large converter in Baltimore, Maryland, and to discuss some problems, that Mr. Perlman had a lot of bags he had picked up in the Valley that were thin guage and were sold below specifications.

Q. Now, Mr. Meyer, did you make a phone call to—or have a conversation with Mr. Harry Borak, on August 19, 1945, at 11:45 a.m.?

A. '45?

Q. 1954.

A. Where?

Q. Did you have a telephone conversation, or a conversation, with Mr. Harry Borak, on August 19, 1954, at 11:45 a.m.?

A. I don't even know what day that was, sir. I can't recall if it was that date or that time.

Q. Mr. Meyer, did you have a conversation with him on or about that time, with relation to a completion of your investigation, of a thorough check covering your bills of lading on August the 2nd invoices number 4115 and 4116?

A. I would have to check the numbers and everything else. I had a telephone discussion with him at that time regarding the first shipment.

Q. All right.

Mr. Wagner:

Do you want him to have his file before him?

Mr. Abbott:

No.

Q. Now, did you receive a letter in which it was stated that you claimed that an invoice called for a certain amount of carrot bags and that your estimate showed a 3.76% shortage, your estimate?

A. I never received a letter of that type, sir.

Q. You did not receive this letter?

A. No, sir. Which letter?

Q. The letter that I am reading from.

A. I don't know. I have never seen it, sir, so I can't hardly tell.

Q. Well, it was introduced in evidence yesterday.

A. I thought this was the one. I never received it, sir.

Q. Well, did you tell Mr. Borak in a phone conversation that you had weighed these boxes and you estimated on that that you were 3.76% short?

A. I just told you I did, sir.

Q. You did?

A. Yes, sir.

Q. All right, sir. Now, then, it is also true that Mr. Borak gave you a credit based upon a shortage of these boxes and some corn boxes, the total of the credit was $80.44?

A. Mr. Borak has never given me a credit or credit, at any time.

Q. That was a misstatement, he didn't give it to you, he gave it to F. H. Vahlsing, Incorporated

A. I would hardly be in a position to know what he gave to Mr. Vahlsing.

Q. As far as you know, that is the only credit that you ever received, and it was based upon your estimate, wasn't it?

A. In the first place, I don't know if he gave the credit. I know that he gave us an adjustment for short count, later on.

Q. Now we can argue the short count all day long, but what you are getting down to when you are talking about short count is not short count in boxes, but it is a short count in your term because the rolls didn't produce the yieldage?

A. That is incorrect, sir.

Q. That is the only thing that you have before this Court, is the yieldage, and you have claimed it because of the invoice number, and you know further that a credit was given to you, not by Roto-Lith, but by Visking, the manufacturer of the base product, on your claim that it was too thick?

A. Sir, I just told you, I never saw the credit or knew about it, so how could I know all the details that you claim?

Q. You know that you got a credit for $1,800.00 for that?

A. Mr. Borak denied he ever gave us any credit for it.

Q. For short count, he did.

A. That's right.

Q. That's correct, but for yieldage that he referred to Visking Corporation, you know that you got a $1,800.00 credit because of the thickness of their product, it was not a credit from Mr. Borak, but a credit from Visking, which he passed on to you, and you know that, don't you, Mr. Meyer?

A. I do not.

Q. This whole thing is merely a figment of your imagination, of alleging a short count based upon the thickness of rolls on which you have a credit?

A. There is a lot of boxes of my figment, sir.

Mr. Abbott:

All right, just—if you don't want to answer the question, don't go any further. We have no further questions.

Re-Direct Examination.

By Mr. Wagner:

Q. Well, while we are up there on that Visking thing, Mr. Meyer, you have been after me the last two or three days to try to go into why you do not believe that it is true that Visking gave that credit and I told you it is too much of a detail and I don't want to fiddle with it.

A. That's right, sir.

Mr. York:

Now, if the Court please, the witness has testified that he does not know—

Mr. Wagner:
That's right.

Mr. York:
—and Mr. Wagner is coming back here and trying to impeach the defendant in this lawsuit.

Mr. Wagner:
I am not trying to impeach him. I said that they went into this Visking thing, that Mr. Borak testified that he got a credit from Visking, and this man is an expert in the field, he knows what the tolerances—the accepted tolerances are, with reference to the sales of film, and—

The Court:
You may let him testify about tolerances.

Mr. Wagner:
I will.

The Court:
Any statement about what he believes is manifestly inadmissible.

Mr. Wagner:
Of course, Your Honor, I was directing his attention to our conversation.

The Court:
Well, that, too, is inadmissible, your conversation with him is inadmissible. Don't consider that for any purpose, lady and gentlemen.

Q. Mr. Meyer, you heard Mr. Borak testify yesterday that Visking gave him a $1,500.00 credit on something about roils that he bought from them.

A. $1,800.00 credit.

Q. Well, $1,800.00 credit, and what is this about tolerances, is there any tolerances in the sale of polyethylene film, as film,—

A. Yes, sir.

Q. —by big manufacturers like Visking?

A. Yes, sir.

Q. What tolerances do they guarantee their films within?

A. On thin guage film, for example, one and a half mil, anything between 1.2 and 1.8 mil is regarded as full delivery. On heavier guages, such as three mil film,—and I have a letter there on it, they have now raised their tolerances to plus or minus seven tenths, as good delivery. When we receive two and a half mil film from Visking and it came in all three mil, they refused to make any adjustment and considered it well within their tolerances. Mr. Borak's one and a half mil film was 1.6 to 1.7, which was within all commercial tolerances.

Mr. Abbott:

Now, if Your Honor please, he is now stating some testimony about some film that a moment ago, when I had him on examination, he knew nothing about.

The Court:

Well, you can argue that to the jury.

A. You were asking me about credits, sir?

The Court:
You can argue that to the jury.

Q. Do you know anything about the film that we are talking about and what it weighed out and all that sort of thing?

A. You mean the film—

Q. Well, let me get at—let me drop that for the moment and I will come back to it. I am going to hand you this file; that is your file, isn't it,—

A. Yes, sir.

Q. —in connection with this weight—I mean the short count, this Roto-Lith matter,—

A. Yes, sir.

Q. —and bags? Now, let's take this letter of his of August the 19th, he is referring here to two invoices, number 4115 and 4116, and he says, "Mr. Meyer claims that invoice number 4115 calls for 385,000 carrot bags and that his estimate shows 3.76%, or a total of $153.00, short." Do you find any of your work figures there referring to that matter of 385,000 carrot bags?

A. 385,500 was the invoice The estimated shortage was 3.76% which is $153.00.

Q. Now, let me—you are going pretty fast on me now. You say that your estimate of the shortage in those carrot bags was 3.76%?

A. That's right, sir.

Q. Now, was that a shortage in rolls, in yieldage, like you were talking about?

A. No, sir, those were delivered as bags.

Q. Those were delivered as bags. They weren't film that was sent down?

A. That's right, sir.

Q. They were boxes of bags?

A. That's right, sir.

Q. All right. The letter goes on and says further, "On the same bill of lading, roll stock in the amount of 1493.6 pounds was invoiced on our invoice number 4116 and Mr. Fred Meyer claims that he received only 1468.3 pounds." Now, that is roll stock.

A. That's right.

Q. That's what we are talking about, this film—

A. That's right.

Q. —here, that is the stuff that we are talking about?

A. Yes. Take one over there to him. Take the roll stock.

Q. That is this?

A. That's right.

Q. All right. Now, on that stuff, you wre invoiced for how much?

A. 1493.6 pounds, and we received 1468.3.

Q. Now, but—let me stay right with it, was that roll stock bought by the pound?

A. No, sir, it was bought by the thousand bags.

Q. By the thousand bags. And was that checked at your plant to see how many bags you got out of that roll stock?

A. It was subsequently, sir.

Q. All right, sir. How many thousands of bags were you invoiced for?

A. 199,150.

Q. And how many bags did you get out of the roll stock?

A. 180,000, sir.

Q. And what percentage of shortage was there on that invoice?

A. Sir, that 180,000 figure is an estimate. This figure here is an estimate, based on the weight per thousand of 385,000 bags.

Q. All right.

A. And the figures we got from the Bureau of Weights and Measures as to the net weight of about—oh, what was it, about—36,000 bags, so I could figure—oh, fiarly closely, on an average, junt what a thousand bags would weigh, and taking that figure and dividing it into the roll stock, it came out 180,000.

Q. All right.

A. Subsequently verified in the plant, when we got about 181,000 out of it.

Q. Was that one of the things that Eliason testified,—

A. No, sir, no, sir.

Q. Another one?

A. That's right.

Q. Your estimate was 180,000?

A. That's right.

Q. And you actually, when you checked it at the plant, you actually got 181,000?

A. Just about one eighty one.

Q. And he invoiced you for how much?

A. A hundred and ninety nine one fifty.

Q. And what percentage of shortage was that?

A. The estimated was 9.55.

Q. And the actual would have been what?

A. I will have to check it.

Q. Yes.

A. About 9.1%, sir.

Q. 9.1 was on the actual count out at the Texas Plastics plant?

A. That's right, sir.

Q. And you had estimated 9.5?

A. That's right, sir.

Q. All right. Now, let's go to the third thing he talks about in this letter, "Mr. Fred Meyer conveyed to me that on the corn bags invoiced as 155,000, that he estimates 151,000 received." Now, what about that? Did you work up that—did you tell him that?

A. Yes, sir.

Q. All right, and what—what are your figures on that?

A. 2.58% short.

Q. 2.58% short?

A. Yes.

Q. Now, Mr. Meyer, a point was made in your interrogation by Mr. Abbott that you stated to Mr. Lutz, and probably Mr. Boler, and different people, that "We were short counted," and "We filed a complaint,' and he made a big point of the fact that you are an employee only of Texas Plastics, Incorporated, and that Texas Plastics, Incorporated, didn't buy anything from Roto-Lith, that Vahlsing's organizations—or rather F. H. Vahlsing Company made the purchases. What do you mean by "we" did those things?

A. All of the F. H. Vahlsing firms are very closely integrated. There is—oh, very little distinction, except in the bookkeeping methods of one company or the other. I work for Mr. Fred Vahlsing. If he wants to call himself Texas Plastics for one phase of his operation, if he wants to call himself FH. Vahlsing for another phase, if he wants to call himself the Bonita Fruit Company for another phase, I still work for Mr. F. H. Vahlsing. The main distinction is in the bookkeeping. Those rolls that were bought by F. H. Vahlsing were transferred to Texas Plastics in

order to be converted into bags, so the short count showed up on our backs, because we were invoiced as F. H. Vahlsing received the invoices from Roto-Lith and we never got the bags out of them.

Q. Now,—

Mr. Abbott:

Your Honor, what they were invoiced as between F. H. Vahlsing and them, I think has no relation to this case whatsoever.

The Court:

Well, I don't think it is particularly important. I will let it in so the jury will have the whole picture.

Q. Now, I call your attention to the fact that these three invoices, D-3 4 and 6, of Roto-Lith's, all of them, the material is invoiced by Roto-Lith against Vahlsing Agricultural and Insecticide Corporation, Elsa, Texas.

A. That's right.

Q. Is that another one of the Vahlsing corporations?

A. Yes, sir, it is right next door to us.

Q. Now, as a matter of bookkeeping, these rolls that were sent in to Texas Plastics and that Texas Plastics converted into bags, they came from Roto-Lith, they were invoiced, according to these exhibits, against Vahlsing Agricultural and Insecticide Corporation?

A. That's right.

Q. And what was done as a matter of bookkeeping between some other Vahlsing corporation, whether it was F. H., Incorporated, or Insecticide, and Texas Plastics, Inc., what was done as a matter of book-

keeping, for the invoiced charge for those rolls that Texas Plastics made into bags?

A. They were just transferred, the exact number, and the exact unit price and the exact quantity, to our books, to be made into bags.

Q. In other words, they charged it against Texas Plastics?

A. That's right.

Q. Now, then, when Texas Plastics—your biggest customer is F. H. Vahlsing, Incorporated, is it not?

A. Biggest single customer, yes.

Q. Biggest single customer, and when you manufacture bags for F. H. Vahlsing, Incorporated, as a matter of bookkeeping, do you charge them with the price of those bags on Texas Plastics' books, as against Vahlsing, Incorporated?

A. I am afraid I—

Q. Well, I mean do you produce them for them and don't charge them anything, just give them to Vahlsing, Incorporated, to pack carrots and—

A. Of course not. We bill them for it.

Q. That is a bookkeeping matter—

A. Yes, sir.

Q. —between the two corporations?

A. That's right.

Q. Now, on this bet of yours that you bet Max Lutz a steak dinner that you would lose your job over this thing, when you got served with this citation for $400,000.00 damages against you and Texas Plastics, I think you admitted that you did have that conversation?

A. That's right, sir.

Q. But you denied that you said that to Max or told Max that you would bet you lost your job because

you had said the things that the complaint said that you had said?

A. That's true, sir.

Mr. Abbott:

Your Honor, I don't understand that question. May I have it repeated?

Mr. Wagner:

I was simply repeating his testimony that he admitted making the bet, but he denied your implication that he bet he was going to lose his job because he had told lies about this man.

Q. You deny that?

A. That's correct, sir.

Q. All right. Why did you say to Max that you would bet him a steak dinner you lost your job over it?

A. Mr. Vahlsing doesn't like to get involved in litigation, he is a man of his word and he seldom, if ever—

Mr. Abbott:

Your Honor please, I don't think it is necessary that this witness testify as to Mr. Vahlsing's character.

A. All right.

Q. No, that's right. You say he doesn't like to get involved in litigation?

A. That's right.

Q. All right. Is that the only—

A. I had just been with the man approximately one year, and by a—what appeared to be a stupid

blunder on my part, of stating—of stating the truth, but simply by stating it, I had involved Mr. Vahlsing and myself in litigation, and had jeopardized him financially.

Q. Now, let me ask you this with reference to Mr. Vahlsing. It has come in evidence here that—I don't know whether—he owns, or something, about thirty corporations. Now is he one of these corporate managers that sits behind a desk on Wall Street and tells other people what to do?

A. No, sir, I find him in the plant at six in the morning and eleven at night and he will help me move rolls and work on a piece of machinery and—

Mr. Abbott:
Your Honor,—

A —his clothes are usually dirtier than mine.

Mr. York:
What is the materiality of this testimony, if the Court please? There is nothing—

Mr. Wagner:
May I state what it is?

The Court:
All right.

Mr. Wagner:
There is a sharp issue here as between Mr. Vahlsing and Mr. Borak. They have established Mr. Borak's personality. I seek to establish the personality of the man with whom Mr. Borak is in conflict in part of his testimony. I think I am entitled to show

what kind of man, so this jury can weigh the evidence that is in conflict.

The Court:

Well, I will sustain the objection. These details are not material and it is not the proper—

Mr. Wagner:

I won't pursue it any further, Your Honor. I was through with the subject.

Q. Now, Mr. Meyer, an interoffice letter of yours that has been read in evidence here, addressed to different Vahlsing corporations,—

A. That's right, sir.

Q. —in which some reference is made that you furnished them with charts in order to weigh incoming polyethylene bags, and you would tell me how much a certain gauge bag ought to weight and so forth and so on, and in passing, some reference is made in that letter to the fact that many of the Vahlsing suppliers were short in their box counts. Now, that letter, I think, was written—let's see what the date of that letter is. That P-6 was written by you on July—apparenly on July 23, 1954. What was the situation on July 23, 1954, with reference to the many suppliers of polyethylene bags to Vahlsing, Incorporated?

A. I had already established down in Elsa, in June, that one of them was seriously short counting us; we were trying to check the others to verify. and we wouldn't assume it was only one, we assumed it was many, until proven otherwise, and we wanted information, if it were true. It was within our own organization.

Q. Now, one other point and I think I will be concluding. There is a possible implication here that since you worked for about four different corporations, I think, before going to work for Texas Plastics, that you might have been fired or your services found unsatisfactory or something like that, so without going into any great detail about the matter, just briefly and generally tell us whether you were fired by these different corporations, whether you moved to better yourself, or what?

A. I was fired by Bakelite when the market dropped and they fired fifty per cent of their plant personnel in a period of two weeks. I lost that job. I left American Cyanamid because I knew I didn't like the dye and the pigment industry, I wanted plastics, which was the reason I went to Bakelite. From there, I went to Johnson & Johnson, which had a lot of plastics and—well, coating applications, in which I was interested. I left Johnson & Johnson because Celanese offered me fifty per cent more pay, a much more responsible and a much more interesting job. I left them because they asked me to move my office down to Charlotte, North Carolina. I don't like the Southeast and I didn't want to live there. When I had an offer to go to Texas, I didn't hesitate.

Q. Oh, yes. Now, about this Lone Star Bag contract that you wanted to go on and he suggested that I let you straighten it out. You said that you signed a proposed written contract, if I understood.

A. That's right, sir.

Q. And then what happened?

A. Mr. Vahlsing told me I was not an officer of the corporation, could not sign any contract; it was therefore invalid,—

Mr. York:
If the Court please, the conversation between him and Mr. Vahlsing has nothing to do with it and is hearsay as far as we are concerned.

Mr. Wagner:
All right, withdraw the answer with reference to the conversation.

The Court:
Don't consider that for any purpose.

Q. Was your action in signing a proposed written contract with Lone Star approved or disapproved?

Mr. York:
We object to leading the witness, if the Court please. This is the defendant in this lawsuit.

The Court:
Overruled.

Q. Was your action in signing a proposed written contract with Lone Star approved or disapproved?
A. It was disapproved, sir.
Q. Were you subsequently instructed, in the course of your business, with reference to—

Mr. York:
Same objection, if the Court please.

The Court:
Yes, state what instructions you had.

Q. All right. What instructions did you subsequently receive as general manager of Texas Plastics, Incorporated, as to who was to be the sales representative, if anybody, of that concern?

Mr. York:
We object to it as hearsay, if the Court please.

The Court:
Overruled.

A. Would you repeat it, please, sir?

Mr. Wagner:
I will ask the reporter to read it.

The Reporter:
"What instructions did you subsequently receive as general manager of Texas Plastics, Incorporated, as to who was to be the sales representative, if anybody, of that concern?"

Mr. York:
If the Court please, that is immaterial to this lawsuit. There is no question of authority of the general manager in this case, they can't come in and say—

The Court:
Well, it may on the issue of exemplary damages as against the corporation, may it not?

Mr. York
As to authority, if the Court please. The cases that I have are to the effect that the general manager or any other superior officer of the corporation, for purposes of exemplary damages, is the corporation.

The Court:
I know, but any superior officer, and it is a question of whether he is or not; is a general manager a superior officer?

Mr. Abbott:
According to the cases, he is, Your Honor.

Mr. York:
Yes, sir, we have some cases on that, if the Court please.

The Court:
I will have to instruct the jury, regardless of what these instructions are,—

Mr. York:
Yes, sir.

The Court:
—that he says he—may say he received, as to sales, I will have to instruct them whether or not he was authorized, or he was a general officer.

Mr. York:
If he was in violation of his instructions, it would be immaterial to the question of whether he was acting in the scope of his employment at the time.

The Court:
That's correct. That's correct, but I will let him testify what his instructions were about sales.

A. All right, sir?

The Court:
Yes, go ahead.

A. I was told that all sales were to come through Lone Star, I was to have nothing to do with them, and I was to confine myself to being plant manager.

The Court:
And when was that?
A. That was in—oh, God, that was in the beginning, when Lone Star first started working; that must have been December or January. It was again repeated to me after the citation was filed, sir.

Mr. Wagner:
I think that's all, Your Honor. Thank you.

The Court:
Any further cross examination?

Mr. Abbott:
Just a few, Your Honor.

The Court:
All right.

Cross Examination.

By Mr. Abbott:
Q. The citation was served on you sometime in the early part of March, 1955, wasn't it?
A. I guess so.
Q. Well, the record speaks for itself.
A. All right. I don't remember the exact—

Q. And you had had instructions before and after that you were to consider yourself the plant manager, according to your testimony right now?

A. That's right.

Q. And after, you did get that instruction, after the citation was served on you in this case?

A. We have no titles—

Q. Just answer my question, please.

A. What is the question?

Q. That you received instructions, after this citation was served, to consider yourself the plant manager.

A. To manage the plant, plant manager, call it either way.

The Court:

The record shows that the writ was served on him the 16th of March, 1955.

Q. All right, sir, and on April the 15th, in the deposition, I asked you, "What kind of work do you do?" and you answered, "Right now, I am more or less the manager of Texas Plastics, I guess."

A. That's right.

Q. You didn't say "plant manager" then, did you?

A. I said "more or less."

Q. Yes. All right.

A. I didn't know what my official title was.

Q. All right.

A. We don't—

Q. Just answer my question, please. Now, just a few more questions, Your Honor.

A. Surely.

Q. Now, didn't you find, when you converted these rolls of film down at Elsa, which were invoiced to

you as bags, that when you converted them from the rolls into bags, that you found that the bags were heavy and consequently the yield was way low?

A. Bags may be heavy, but the yield should still be there, there should be full delivery, you measure by yards, not pounds.

Q. Admittedly, however, sir, when the poly is too heavy, you get a sixty five pound roll, you are going to get less bags at the end than if you had thinner poly, finer gauge?

A. That's true.

Q. So your complaint is based upon the fact that you got roll stock and it says on the invoice you would get a thousand bags out of this and it comes out down there, it has got 910 bags, isn't that right?

A. No, sir.

Q. Refer to page 61 of your deposition.

A. Okay.

Q. "Question: I am only considering, right now, the weight of the rolls." We were talking ab . these rolls that you had gotten down here and you had claimed first, when you went to the Bureau of Weights and Measures, that we had short weighted you on the rolls, and then they found out that—

A. I never claimed we were short weighted on rolls, sir.

Q. —that you got less weight in the rolls than the bill of lading called for,—

A. I didn't—

Q. —and then Mr. Dolan made his inquiry to you and you had taken two boxes out yourself, and that made the bill of lading over, didn't it?

A. That is entirely incorrect.

Q. Well, Mr. Dolan was here to testify. I don't remember it being contradicted.

A. Mr. Dolan testified they were—

Q. Just—

A. Excuse me.

Q. Now, then, the answer to that question says, "On the rolls, we never complained on weight except the first shipment down in Texas here where we were short on weight—" and I want to stop at that point, it does go on, but that is referring to these two or three invoices over here where we were supposed to ship you 124 pounds and it arrived 122.3 pounds, isn't that right? Isn't that what you are talking about? Well, in that vicinity.

A. Yes.

Q. And the next one, we were supposed to ship you 796 pounds and we shipped you 778 pounds, or whatever it was, we were 18 pounds short on that?

A. The figures may be right,—

Q. Speak for themselves, and they are before—

A. I don't know what you are talking about, in relationship to the figures.

Q. All right, but we sent you that amount in rolls and charged you by the bag?

A. That's right.

Q. And when it came out down at the end of the line, you just didn't have that many bags, did you?

A. There weren't that many bags in it.

Q. That's right,—

A. That is a difference.

Q. —there wasn't. There wasn't that many bags in it, and you came out with a 9.55% shortage, didn't you?

A. You have got three shipments all confused again, sir.

Q. All right. On the invoice for 199,150 bags, you wound up, when you—that was the roll stock, wasn't it?

A. Can you give me the date of the invoice or when it was picked up?

Q. Well,—

A. I don't know what you are talking about.

The Court:

I don't think there is any—you all have gone over this before,—

A. Oh, here you are. I have got it.

The Court:

I don't think there is any dispute. Those say so many pounds, the equivalent of so many bags, right on the face.

A. Yes, sir.

The Court:

Or so many bags, right on the face.

A. That's right, sir.

The Court:

The equivalent of it.

A. That's right, sir.

The Court:

It is not billed as bags it is—yes, sir, Mr. Juror?

Juror:

There has been a lot of discussions; I am wondering whether the dollar per thousand was determined on the hundred there, whatever—

Mr. Abbott:
It was, ninety nine thousand, for the making of them, or on the 191,000.

The Court:
Well, ask him.

The Witness:
No, sir?

The Court:
Yes. Let me have those—

A. It was allowed on the invoiced quantity, sir.
Q. Well, you mean on the 199,000?
A. That's right.
Q. All right.

The Court:
Right here, now, for instance, here is Exhibit D-3, thirty six hundred—thirty two and three tenths pounds in rolls, equivalent to four hindred and twenty one M—that means thousands—
A. Thousands.

The Court:
—bags.

A. That's right, and we got 385 or 371, something like that.

The Court:
Well, the juror's question is, were you allowed the dollar a thousand discount on the four hundred and—

A. Yes, sir.

The Court:
—twelve thousand bags,—

A. That's right; four twenty one, sir, yes, sir.

The Court:
That this was supposed to be the equivalent of,—

A. That's right. That's right.

The Court:
—or some less number of bags?

A. No.

The Court:
That is what you are asking, isn't it? He says on invoiced equivalent number of bags.

Mr. Abbott:
I have no further questions, Your Honor.

Mr. Wagner:
Now,—

The Court:
You have had him twice apiece now, counsel. This witness has been on the stand long enough.

Mr. Wagner:
Just a question on this last point here.

The Court:
All right.

Re-Direct Examination.

By Mr. Wagner:

Q. How were you charged on this very invoice that you were asked about, by the number of pounds or by the four hundred and twenty one thousand bags?

A. We were charged by the four hundred and and twenty one thousand bags.

Q. And so much per thousand bags?

A. That's right, sir.

The Court:

All right, you are excused.

The Witness:

Thank you, sir.

The Court:

Now, I believe the jury has been in here since 9:00 o'clock, haven't you?

Juror:

Yes, sir.

The Court:

I am going to give you a recess at this time—we haven't been here quite that long—so we will take a fifteen minute recess, and don't discuss the case or permit anybody to discuss it in your presence.

(Whereupon a fifteen minute recess was taken.)

Mr. Wagner:

Call Mr. Jim Abbott to the stand, please.

The Clerk:

Do you want him to be sworn or do you want to waive the swearing?

Mr. Wagner:

I will waive the swearing of the witness.

JAMES C. ABBOTT, testified as follows:

Direct Examination.

By Mr. Wagner:

Q. Mr. Abbott, you are one of the counsel for the plaintiffs in this case?

A. I am, sir.

Q. You had an occasion to go to Max Lutz' packing shed and count two boxes of Roto-Lith bags?

A. I had occasion to count—I think I counted one more or less by myself and participated in the other.

Q. Would you examine these two boxes and see if these are the boxes that you counted?

A. I see that I marked, in my handwriting, on the box, the number that I found in the box, and initialed it.

Q. Now, the box you are referring to is a box bearing the Roto-Lith, Limited, label on it, sir?

A. Yes, sir.

Q. Now, wait just a minute, Mr. Abbott, please. And it is marked to contain 2M. That means two thousand bags, does it not?

A Yes, sir.

Q. And you marked this box as—let me show you this. In addition, on the outside of this box, it says, "1,845," and then it is initialed "J. C. Abbott," is it?

A. "J. C. A."

Q. J. C. A. and those are your figures and your initials?

A. The outside figures are mine and the initials are mine.

Q. All right. Now, on the inside of these flaps, there is a series of numbers and totals on them, one total being 584 and another total being 529 and another total 732. Are those your figures or someone else's?

A. I don't recognize them as being my figures. I believe they are my secretary's figures.

Q. Uh huh. Now, then, while you are here, would you look at this other box, sir?

A. Yes, sir.

Q. This other one says, "Excello Process Bags by Roto-Lith, Limited," does it not?

A. Yes, sir.

Q. And it is marked to contain how many?

A. 3,500 bags.

Q. And on the top of it, there appear the figures, "2,984, J. C. A."?

A. Yes, sir.

Q. Are those your figures and your initials?

A. They are, sir.

Q. Placed there by you?

A. Yes, sir.

Q. And on the inside covers, inside of the four flaps that constitute the cover, there is a whole column and series of smaller figures, are there not, for instance, 53—

A. Yes, sir.

Q. —and 71 and 103?

A. Yes, sir.

Q. Are those figures in your handwriting? I guess handwriting are figures. Do you recognize them as yours?

A. I see—it appears to be my handwriting, on those figures.

Q. Uh huh. Do you think that this larger 3,500 box, then, is the one that you counted by yourself?

A. I would suspect that it is.

Q. All right. And the total you found in that box was 2,984?

A. Yes, sir.

Q. And the other box, you say you counted along with someone else?

A. I believe that I participated in counting—I want to state it this way, that I, together with my secretary counted one box, I am quite sure, by ourselves, and as to the other boxes, I probably paricipated in that. Now, which one it was, I don't know. I assume that I counted the larger box.

Q. And you say you participated, was it with another partner of yours, Mr. Scott Toothaker, that you participated?

A. Yes, sir.

Q. And you gentlemen had gone over there in order to count one or more of these Roto-Lith boxes to see if they had the number of bags in them that they were indorsed to contain?

A. Well, I could answer that "No, sir" but it would just string it out. We didn't go over for that purpose, but we went over there and did, after we got there, procure the boxes.

Q. And the boxes, when you first started to count them, were these red taped seals across the top? They were not open like they are now, were they?

A. No, sir.

Q. They were sealed boxes?

A. They were, sir.

Q. So far as your could determine from their appearance, they were in the condition in which they left the Roto-Lith factory?

A. So far as I could tell, yes, sir, they were sealed on top.

Q. Of course you are no detective and somebody might have, with a great deal of difficulty, gotten into them, but you don't know about that, of course?

A. I wouldn't speculate on it at all.

Q. But you saw no evidence of anything like that having happened?

A. I made no investigation, particularly, I don't know what could be done. I do know that the seals on the top and so on were, apparently, the same that were put on there at the factory.

Q. Was that in approximately May?

A. I think it was probably somewhere around May the 23rd or 24th of 1955.

Mr. Wagner:

No further questions.

Cross Examination.

By Mr. York:

Q. Mr. Abbott, what occasioned your going to Max Lutz' shed?

A. Well, information that I had obtained from Max Lutz.

Q. What was that information?

Mr. Wagner:

Now, just a moment. We will object to any hearsay information that he got from a third person.

Mr. York:

Don't offer it to prove that it was true, Your Honor. We only offer it to impeach Max Lutz and to impeach this testimony that has been offered here as proving that these bags were short.

Mr. Wagner:

We will object to the testimony being used to impeach Max Lutz without laying any predicate for such an impeachment and it is an effort to impeach their own witness, Max Lutz. Max Lutz wasn't asked about—

The Court:

I don't recall any effort being made to impeach him on—

Mr. York:

No, sir, it isn't our evidence, Your Honor. It is Mr. Wagner's evidence. He has been coming in here with all these—this laboratory count of bags that Max Lutz furnished to the laboratory and I feel that we have a right to—after he has proved that Mr. Abbott went over there and counted the boxes, why he went over there to count them, or under what circumstances, or the rest of the circumstances surrounding his going over there to count them.

Mr. Wagner:

I agree to the circumstances, Your Honor.

The Court:

I sustain the objection.

Mr. York:

May I ask if it wasn't the result of a conversation—

The Court:
Sir?

Mr. Wagner:
Sure.

Mr. York:
—if it wasn't the result of a conversation with Max Lutz?

Mr. Wagner:
That is all right.

The Court:
He has testified to that.

The Witness:
Yes, sir.

Q. And after you had completed this, Mr. Abbott. what did you do?

A. Well, after the conversation, I talked to Mr. Toothaker. As a result of that conversation, we both decided that we would go to Mr. Lutz' shed to determine the basis of the inquiry. We did so. At that time, based upon the information that I had received, not from Mr. Lutz, but through another party, Mr. Ewers, of our firm, we inquired about the statements that he had made to Mr. Ewers. Thereupon, Mr. Lutz said that—rather, thereupon, it was decided that there should be an inquiry made into an alleged shortage. Mr. Lutz then picked out two boxes these two boxes, bout of some boxes numbering anywhere from 15 to 35 that he had stacked up in his office upstairs, in the warehouse building. He selected these two boxes out of

that group and handed them to me and it was suggested that I count them for myself and I did. Now,—

Q. Thereafter—sir?

A. After counting them and making the notations that I did on the box, I then thought it necessary to convey the result to Mr. Borak, which I did, and upon doing so, he indicated that he would come to the Valley immediately to conduct his own investigation. I talked to him at 5:00 o'clock at night and he caught the midnight plane, was here at 10:30 the next morning, rather in McAllen. I met him at the airport, told him what had happened, and we went immediately to Mr. Lutz' shed. Upon arrival there, Mr. Lutz indicated that there was no necessity for Mr. Borak having made the trip, that their—

Mr. Wagner:

Now just a moment. Whatever Mr. Lutz is saying on that occasion, I object to, Your Honor, as hearsay as to us.

The Court:

I will have to sustain it.

A. All right. In the meantime, and because of the conversation at 5:00 o'clock at night on the preceding evening, I engaged ten high school aged boys. I attempted to procure the services of ladies of the Junior Service League in McAllen, and the Crippled Childrens Home people or someone that could make a few dollars in counting bags; being unable to do so, I secured ten high school boys and told them to be ready at 11:00 o'clock in the morning, to count bags, it being apparent that that would be the endeavor of Mr. Borak. We arrived at the shed about 11:00 o'clock in the

morning and there was no complaint registered in my presence as to short count of the over-all shipment. Mr. Borak was not satisfied with that disposition of the statements that I had related to him and he insisted upon the right to count the bags with these ten boys, to make a full and accurate count. He made the reservation, however, that he would not count specially selected boxes that were placed up in Mr. Lutz' own office, that he would prefer to select the ones down in the general warehouse, and there was no agreement on that that it was—the agreement was that it wasn't necessary, and Mr. Borak would have been content to have counted even those boxes that were specially selected and placed up into the office of Max Lutz, if Mr. Lutz could state to him merely that he personally had brought them up. There was—Mr. Lutz could not do that, they had been brought up by another party, Johnnie Snider. Whereupon there was no complaint registered as to the over-all shipment, an effort was made to count the bags to satisfaction, additional boxes down in the warehouse had subsequently been counted after the 5:00 o'clock conversation,—

Mr. Wagner:

Now, Mr. Abbott, I am sure you realize what is proper and what isn't. I want to object now—I have no objection to all of these things, but I am going to object to any testimony about what ten high school boys said they found. That would be obviously hearsay and—

A. Yes, sir.

Mr. Wagner:

—would have no—

A. I don't intend—

Mr. Wagner:

I know, but I thought, in narrating your story, you might inadvertently mention it.

A. Mr. Lutz had counted, on his own, with his own employees, the boxes down in the general warehouse, and registered no complaint about a full delivery. He accepted it as a good and full delivery, over the protests of Mr. Borak, who wanted it positively clear one way or the other, without any question, whatever a count—sample count revealed, of the boxes that were untampered, not touched, or that they would say were the ones that were delivered there, Mr. Borak indicated that he would be satisfied to go into those. That permission was refused by Mr. Lutz. He would not permit him to go into it and accepted the delivery of all of his boxes as full and complete, without any shortage. There were other conversations, of course, relating to the boxes up in the special office. At the conclusion of that meeting, Mr. Borak then returned to New York City.

Mr. Wagner:

Thank you.

Q. In the course of the meeting between Mr. Lutz and Mr. Borak, didn't Mr. Borak show Mr. Lutz how bags could be taken out of these boxes without breaking the seal.?

A. Yes, he did.

Q. And after this count that was made, and after Mr. Lutz accepted the shipment as a good delivery and made no further complaint and wouldn't allow any further investigation to be made of the boxes, didn't he execute—or did he excute any instrument?

A. Uh—

Mr. Wagner:
Now, just a moment, Your Honor. I am going to object to all that. I don't know what the evidence is, but any instrument that was executed at that time has nothing to do with any issue in this case.

The Court:
Overruled.

A. Yes, there was no further issue regarding these boxes and there was an indebtedness owed by Mr. Lutz to Mr. Borak, somewhere around fourteen or fifteen thousand dollars, and for various reasons, which I probably shouldn't go into now, it was not paid, and decision was made to request notes and checks payable in the future, which were executed by Mr. Lutz, in favor of Mr. Borak, for the entire shipment.

Q. For the entire shipment?

A. Yes, sir.

Q. For the entire indebtedness?

A. Yes, sir.

Q. And that was done, after all of this had transpired of counting and of Mr. Lutz not allowing any further inquiry into it and accepted it as a full delivery?

A. That is correct.

Mr. York:
We have no further questions.

Mr. Wagner:
No further questions.

The Court:
All right, sir.

Mr. Wagner:

Mr. Fred Vahlsing, Junior.

FREDERICK J. VAHLSING, JR., having been first duly sworn on oath, testified as follows:

Direct Examination.

By Mr. Wagner:

Q. What is your name, sir?

A. Frederick J. Vahlsing, Jr.

Q. How old are you, Mr. Vahlsing?

A. I will be thirty the 29th day of August.

Q. Did you go to college?

A. Yes, I went to college. I went to university in Boston and I graduated from Princeton University.

Q. When?

A. Graduated—well, my college career was interrupted by the service and I finished it in 1948, graduate from Princeton in 1948.

Q. Well, how long were you interrupted? Were you in the service, you say?

A. Yes, I was in the service about two or three years.

Q. And you finished when, you say, '48?

A. Yes, I graduated in 1948.

Q. And since graduation from college, with what organization or organizations have you been connected?

A. Working for my father in the New York office, on the sales desk, selling vegetables and doing my share in the office.

Q. Are you a stockholder in the various corporations?

A. Yes, I do own some stock in some corporations, various corporations.

Q. And you say you do some selling. Do you hold a title with F. H. Vahlsing Company?

A. Yes, I am vice-president of F. H. Vahlsing. I handle all the sales, I supervise all the sales. We put over our desk from twenty to thirty thousand railway cars of merchandise a year. There is one other salesman besides myself in the office. I don't think there is any other firm in the country that sells more than we do.

Q. When did you first meet Mr. Harry Borak?

A. I met Mr. Borak—I couldn't be exact, it was the end of November or the beginning of December of 1953.

Q. Did he call on you or you on him?

A. Mr. Borak called on me.

Q. In connection with bags?

A. Yes, to sell me polyethylene bags.

Q. Did you place an order with him?

A. Subsequent, yes, he came over and we spoke about polyethylene bags.

Mr. York:

If the Court please, it is unresponsive here. He asked him if he placed an order with him.

A. Yes, subsequently, I placed an order with Mr. Borak.

Q. Did you—you have known Mr. Borak, then, from that time on down to the present?

A. Yes, I have known Mr. Borak.

Q. Have you had any occasion, after you placed your order with him, to visit his plant?

A. Yes, I visited Mr. Borak's plant possibly four, or definitely three times.

Q. Was his plant in production on the occasions you were there?

A. On definitely two times, possibly three times.

Q. Do you recall whether or not he was producing any bags for Vahlsing while you were there?

A. Yes, he was, two times, he definitely was.

Q. Did you make any observation with reference to the final end production of these bags just before they go into the boxes,—

A. Yes.

Q. —where they are counted, at the table?

A. Yes, we did. He showed me throughout the plant and the quality of the bag seemed thoroughly good, it seemed like a nice bag, and—however, as the bags were coming off the machine, there were a few that weren't sealed in the back and weren't sealed at the bottom and they were then thrown in the basket and I made the remark to Mr. Borak, he was standing there, and I said, "How do you make sure that you have exactly what you have in this box?" If you will look at the box over there,—

Mr. York:

If the Court please, this is not, apparently—he is explaining his statement, not the statement that he made to Mr. Borak, his conclusion on it.

A. Excuse me, I'm sorry. I said, "How can you make sure that we receive exactly what is in the box that we are getting charged for?" And Mr. Borak, "Have no fear of that, we check and double check everything in our plant," and I was convinced that the bags—

Mr. York:

If the Court please, his being convinced is immaterial, he is not stating the conversation.

The Court:

It is not responsive. He has answered the question.

Q. All right. Now, then, when did the Roto-Lith Company start making deliveries of these bags?

A. I could not testify definitely except that it was probably early January of 1954.

Q. '54?

A. Yes, the first ones started being delivered then.

Q. Then as he would ship these bags out to Vahlsing's company, would he present invoices for them?

A. Yes, we were presented invoices in the New York office and they were honored—

Mr. York:

If the Court please, that is going beyond the question.

A. Excuse me. I'm sorry.

Q. You heard Mr. Borak testify here, implying that he had a terrible time getting you people to pay his invoices, and that's why I am simply asking you about what treatment was accorded the invoices during the early part of his deliveries to you in January, February and March

A. We treated the invoices in the normal manner, which has been acceptable to the people—

Mr. York:

If the Court please, now that is neither here nor there, that is hearsay.

A. They were paid in—they were paid, money advanced in them, in due time.

Mr. York:

We object to that as a conclusion, unresponsive and immaterial to the case.

The Court:

I will let the answer stand.

A. The invoice—

The Court:

Just pay attention to the questions and answer.

Q. I think those invoices that are in evidence state terms of net thirty days, one per cent ten days.

A. Yes.

Q. Commercially, what does that mean?

A. Well, if you pay the invoice within ten days, you can take off one per cent, and if you pay the invoice within thirty days, you honor the invoice in full.

Q. Do you recall whether his invoices in January, February and March were paid taking advantage of the one per cent discount or were they paid in thirty days or did you—

A. We had a situation where these invoices were sent to Texas and they were supposed to be paid from Texas and Mr. Borak didn't want to wait—

Mr. York:

Now, again, that is unresponsive to the question, whether the invoices were discounted or not.

A. The invoice—the—the—well, I cannot answer the question the way it is phrased and without an explanation.

Q. Well, let me ask you this way, do you have any personal knowledge about whether discounts were

taken or whether they were paid net or how? If you have no personal knowledge, well, just say so.

A. I don't have any—well, I do have a personal knowledge, but I can't answer that question.

The Court:

Apparently you don't have a personal knowledge of the particular payments.

A. Each particular payment, but however,—

Mr. York:

If the Court please, we object to his volunteering a statement.

A. —discount was taken on some, I think.

The Court:

Well, I will—

A. I mean it is hard to—

The Court:

I will let that answer stand, he says discount was taken on some.

Q. Was there any complaint from Mr. Borak—now, I am restricting myself to the first three months, January, February and March—with reference to the payment of his invoices?

A. There was a complaint, he said he needed money and if he could get paid as quickly as possible, we were acceptable in advancing him ten or fifteen thousand dollars from the office before the invoices were processed.

Mr. York:

Now, if the Court please, we object to this testimony of advance when it is already and obvious that the bags have already been delivered and the invoices sent to him and he is speaking in terms of advancing money for goods that he already has and is using.

The Court:

Well, I will sustain the objection.

A. Well, payment—

The Court:

You needn't argue the case. I will rule on the objections.

A. All right.

Q. Now, then, you heard Mr. Tom Blackwell testify about the inventory shortages that started showing up here in March and April of 1954, in Texas.

A. I did, sir.

Q. Was the New York office informed of that shortage showing up?

A. Yes, I was. Yes, it was.

Q. Now, as the season continued advancing, did you receive information as to what was happening to that inventory shortage?

A. I did.

Q. At any point in your relationship with Mr. Borak and Roto-Lith in the year 1954, did you stop paying his invoices?

A. Yes, we held up, upon instructions from the boss, my dad, that—

Mr. York:
If the Court please, that is unresponsive and it is immaterial, hearsay, and instructions. The Court has excluded hearsay that we have attempted to offer this morning, in explanation, and I believe that the same is still—

The Court:
I don't need to be reminded of my previous rulings. I will overrule the objection.

Q. You did stop paying his invoices at a certain point?
A. Yes.
Q. What is your recollection as to when that was?
A. Well, a definite stop was made around the middle of June or first of July. The first warning cloud on the horizon was that we were—our office and myself was nstructed by my father, from Texas, that he had a meeting with Mr. Borak at Mathis and that they had counted boxes down there and had found shortages and that he wanted to investigate the matter further before we paid Mr. Borak in full.

Mr. York:
Do we—

A. Those—

Mr. York:
Pardon me. Do we have a running objection to this hearsay, if the Court please?

Mr. Wagner:
Well, I don't want you to tell what—

The Court:
You may have a standing objection and I will try to stop him now and see that he gets down and answers these questions and not have—delay this any further.

Q. Was Mr. Borak informed that you all were checking his boxes because you thought there might be shortages in them?
A. Yes, he was present at Mathis with my father.
Q. Now, you weren't there in person.

The Court:
Now listen,—

A. Oh, I see.

The Court:
Don't consider that.

A. No.
Q. What you know yourself, in New York, did you ever have occasion to have a conversation with him about invoice payment or something in which you told him you were checking his boxes?
A. Yes, definitely.
Q. What information did you have of the—

The Court:
No, that isn't the question. The question is what did he say to him? Now you have established—

Mr. Wagner:
I am not going to ask him any more about that.

The Court:
—that they had—

Mr. Wagner:
I have already finished that phase of it, Your Honor.

The Court:
What?

Mr. Wagner:
I am not going to ask him any more about that.

The Court:
Well, now you are asking what information he has.

Mr. Wagner:
All right, I will put it in another way.

Q. Did you know anything about the Bureau of Weights and Measures check that was made, that has been in evidence here?

A. Yes, I did.

Q. Did you know that it was going to be made before it was made?

A. Yes, I did. May I enlarge on that?

Q. Well, just a moment. Had you been receiving reports—state whether or not Mr. Meyer kept in touch with you, with what he was doing?

A. Yes, he did.

Q. And did you know that a complaint was going to be made to the Bureau of Weights and Measures and request that they check some shipments?

A. Yes, I did.

Q. Now, it is in evidence here that on August 17, 1954, Mr. Dolan served a violation on—

A. I didn't get the date.

Q. Are you hard of hearing?

A. In one ear, yes.

Q Which ear?

A. This one is the bad one.

Q. All right. It is in evidence here that on August the 17th,—

A. Okay now.

Q. —Mr. Dolan served a violation on Mr Borak.

A. Yes.

Q. Did you have any conversation with Mr. Borak on that date?

A. I most certainly did.

Q. All right, what was that conversation?

A. Well, around a quarter of five in the evening, Mr. Borak came into my office with a Mr. Saul Segal. Mr. Saul Segal, I didn't know, or had never heard of, and he came into the office and he notified me that he wanted to get paid in full for the invoices which we owed him.

Q. What was that amount?

A. The amount was approximately $21,000.

Q. All right.

A. And I said to Mr. Borak, I said, "I cannot pay you until I see this whole situation, how it comes out. It may take a day, two days, a week, I don't know," and he said, "Well, what is wrong?" I said, "There is possibly some short delivery," and he flew into a rage and said, "Are you calling me a crook and a thief?" And I said, "No, sir I never called anyone a crook or a thief and I never will," and this Mr. Saul Segal stood there and looked at me and I said, "I cannot advance you any money 'til I talk to my dad," and he said, "Well, when will that be?" And I said, "I will try and contact him tonight, and I will call you at home tonight," and he said, "Will you do that?" And I said "Yes," so I called my father at home that night.

Q. Just a minute, Mr. Vahlsing.
A. All right.
Q. Did Mr. Borak give any reason about why he wanted money right away?
A. Well, yes at that time, he said that he had a due note at a bank and he must have the money.
Q. Did he say he must have all of it?
A. He said all, or partially, he was looking for $10,000.00, at least, and I was doing everything in my power to give the man—

Mr. York:
If the Court please,—

A. —a fair—

Mr. York:
—these are conclusions and not conversation.

The Court:
Now, you see, he didn't ask you what you were doing.
A. I'm sorry.

Q. You told him you would call your father that night and then you would call Mr. Borak at his home?
A. That is correct.
Q. Did you tell him whether you were going to try to get authority from your father to make him a thousand dollar payment?
A. Yes, I told him that.
Q. Did you try to get your father that night?
A. I did, yes.
Q. Could you locate him?
A. No, I could not locate him. I tried up to 8:15 and my mother said that—

Mr. York:
If the Court please,—

A. Excuse me. Go ahead.

The Court:
You see, that is hearsay.

A. I'm sorry.

Q. About 8:15 you hadn't been able to locate him?
A. No.
Q. Did you communicate with anyone?
A. I called Mr. Borak and I told Mr. Borak I could not get my father that night, to advance him his money, but come to the office at 8:45 tomorrow morning and that my dad would be in the office at that time and that to talk to him at that time and see if we could get this matter straightened out satisfactorily.
Q. Now wait just a minute.
A. All right.
Q. Now, you say that you couldn't locate him. Did you receive information from someone else to lead you to believe that your father would be in the office the next morning?
A. He would be there—definitely he was in the office at 8:30.
Q. I see. All right.
A. He just wasn't in that afternoon Mr. Borak was there.
Q. Now, then, about the next morning, did Mr. Borak come in the next morning?
A. Yes, he did.
Q. Was your father there the next morning?
A. He was—he came in about five to ten minutes after Mr. Borak came in.

Q. Did they have a conversation—did you see them converse?

A. Yes and no. I mean, I was in one office and—

Mr. York:

If the Court please, that is susceptible to a "Yes" or "No" answer, did he see them converse.

A. Well,—

The Court:

All right, you may answer.

A. Well,—

Q. Where were you that morning when Mr. Borak and your father were there?

A. Well, may I explain the physical circumstances?

The Court:

The question is "Where were you?"

A. Well, I have to explain the physical surroundings, to locate—

Q. Were you in your office?

A. Yes. You see, we have a sales office—we have a large office, it is about half the size of this Courtroom, and one side of the office, about from there to here, is the sales office, that is sort of glass enclosed, so that the noise and everything from the outer office doesn't hit us on the telephone.

Q. Is that where you were?

A. Yes, I was in that sales office.

Q. And a battery of telephones there, I guess?

A. There are telephones there, yes.

Q. All right. Did you see Mr. Borak that morning?

A. He came—Mr. Borak came into the office and—

Q. Now, wait a minute, into this sales office?

A. No, into the large office, he walked in, and he was announced by the intercom, that Mr. Borak was there, and I looked around through a small window and saw Mr. Borak standing there and I flipped back on the intercom and said, "My dad will be in in a little while. Please tell Mr. Borak to wait," and I continued on my business.

Q. All right, did your dad come in later—did you see your dad come in later?

A. Yes, my dad entered the office through a door which only he uses, it is a little door—in the sales situation, so he does not come through the office, he walks in this way, and I announced to him that Mr. Borak had arrived at the office.

Q. Did you discuss with your father—now, don't say what you told your father, but just tell us in a general way, did you have some conversation with your father with reference to your preceding day's conversation?

A. Yes, I did.

Q. Don't tell us what the words were.

A. All right.

Q And as a result of that what did your father do?

A. My father opened the door of the sales office and walked out and said to Mr. Borak that he couldn't talk to him at that moment, to come and see Junior and settle it, that Mr. Burphene from the Borak company was downstairs waiting and had to go out on Long Island and that he had not been notified from any agency what had happened and could not discuss the matter with him at that moment, but would be willing to discuss the matter as soon as he got the facts from the Bureau of Weights and Measures; then Mr. Borak—

Q. Now, wait just a minute, before we go on from there.

The Court:
Did you hear that?

A. Yes, I heard that. The door was open and they were standing about right there and my dad—

The Court:
I just asked you if you heard it.

A. All right.

Q. Now, don't tell what instructions he gave you, but when you and your father were having a conversation before he went out and talked to Mr. Borak, did—

A. He came into the office and talked to me.

Q. All right, when he came into the office and talked to you,—

A. Yes, sir.

Q. —did he give you some instructions to go by when you did talk to Mr. Borak? Now, don't tell us what.

A. No he didn't say any general instructions, he just went out the front door.

Q. All right, sir. So you heard him tell Mr. Borak to talk to Junior about it?

A. To come in to see me, and he came in to see me and we talked about the situation and he said that—

Q. Who is "he"?

A. Mr. Borak. Mr. Borak said, "Now, Freddie, we definitely must get paid on this account by next Monday," and I said, "Mr. Borak," I said, "the same as I told you last night, I am waiting from the results of

the Bureau of Weights and Measures, we have had a large shortage in Texas, to the tune of nine to ten to eleven thousand dollars, I don't know exactly and I cannot pay you 'til we check and see where we have been short counted," and he said to me, "if I don't get this money right now," said, "I will make you the sorriest man in the world, regardless what I have to do." Those were his exact words.

Q. Did he speak loudly, in a loud voice?

A. Yes, and my whole office heard him, and he walked out the door, sir, and slammed and almost broke the glass in the door, and two days later, I was sued for a million dollars, for calling him a crook.

Q. Well now, did you call him a crook?

A. I most certainly did not call him a crook.

Q. Well, calm down, calm down, Mr. Vahlsing. Did you hear Mr Borak testify that early in his production of bags for you, that you were at his plant one time—I think he said this about you, now, I am not—

A. Beg your pardon. I didn't hear. I'm sorry.

Q. Excuse me. I will speak a little louder, but I hope I don't get you to speaking louder too. Did you hear him testify that on one occasion when you were at his plant, that you told him that he made the best bags of any of your suppliers, and did you ever—did you state that to him?

Mr. York:

Pardon me, counsel. The record, as I recall it, says that Vahlsing Senior said that to Mr. Borak, and not Junior.

Q. Well, did you on any of these occasions that you were there, tell Mr. Borak that the bags he was producing for you were the best that were being furnished you by any of your suppliers?

Mr. York:
We don't contend that that statement was never made by Junior.

A. No, I don't think so, but his bag was fair to good. It was a decent bag. I liked it, yes.
Q. Did you ask him to put on another shift, at from twelve midnight to eight in the morning shift?

Mr. York:
The evidence again ahows that that conversation was between Mr. Borak and Mr. Vahlsing Senior and nothing was said in the presence of—

The Court:
Yes, there is no contention—

Mr. York:
No contention.

The Court:
Mr. Borak testified that Mr. Vahlsing Senior asked him to do that.

Mr. Wagner:
All right.

Q. Mr. Borak also testified that on one occasion when you were there, that the machine was running with a broken counter on it and his attention was called to it and that you told him just to go on and run it, that you needed the bags so badly that you didn't care whether he was getting an accurate count or not. Any such thing—
A. There was no such—

Mr. Abbott:
Your Honor, there was no such testimony as that.

The Court:
I don't recall it.

Mr. Wagner:
All right.

The Court:
I don't recall it.

Mr. York:
Pardon me, counsel, you are correct on that.

Mr. Wagner:
Huh?

Mr. York:
You are correct on that; there was such testimony

Mr. Wagner:
Well, I will leave it alone.

The Court:
Well, he says he didn't tell him that, anyway.

Mr. Wagner:
I will leave it.

The Court:
This witness says he didn't tell him that.

Q. Now, Mr. Vahlsing, a letter that has been marked P-2 has been introduced in evidence here.

There is in evidence here a summons that was issued for you in that million dollar libel suit, dated August 19th of 1954,—

A. Yes.

Q. —and also there has been introduced in evidence a letter written by Mr. Borak to F. H. Vahlsing, Incorporated, also on August 19, 1954, and I direct your attention to this particular portion of the letter,—the first part of it goes into shortages that Mr. Meyer had claimed,—

Mr. Abbott:
Which exhibit is that, counsel?

Mr. Wagner:
P-2.

Q. This letter says "Therefore—" this is addressed to your company— "—we accept your complaint of $192.00 covering these invoices and based on our understanding that 98% would constitute a good and acceptable delivery." Now, I concede that "our understanding" is a somewhat ambiguous term, is it not? You as a college man recognize the use of the plural "our" meaning "we"?

A. Yes.

Q. And also it might mean "our"—that is me, the writer?

Mr. York:
Now, if the Court please,—

The Court:
You can argue that to the jury.

Mr. Wagner:
All right, Your Honor.

The Court:
What do you want to ask this witness about that letter, did he get it?

Mr. Wagner:
Yes.

Q. Did you get that letter or do you know?
A. Yes, that letter was received at our office and came to me through the normal channels, and upon—
Q. Now, wait just a minute, don't go into—
A. Right.
Q. Let me ask you the question about it because there might be some objection and if we go at it this way, we will have a chance to stop it. The letter refers to "our understanding that 98% would constitute a good and acceptable delivery." Did you have any understanding with Mr. Borak that 98% would constitute a good and acceptable delivery? Just answer "Yes" or "No."
A. Absolutely not.
Q. Have you ever had such an agreement with anyone?

Mr. York:
That is immaterial, if the Court please.

Mr. Wagner:
All right, withdraw the question.

Q. Now, let's get up to this settlement here. There are two releases in evidence, one of them signed by

Harry Borak on August 31st and the other one signed by your dad—the other one signed by your dad; the face of it says "The blank day of September."

A. I didn't hear that.

Q. Oh. Mr. Borak's release is dated August 31, 1954.

A. Right.

Q. Where, for $10.00, he releases all Vahlsing corporations. Then the one by your dad is acknowledged September the 13th, that is thirteen days later, signed by your dad, in which he releases Harry Borak and Roto-Lith from any controversy. In the latter part of August, the Bureau of Weights and Measures business was still pending, wasn't it?

A. Yes, it was.

Q. And the libel suit against you and your father for a million dollars was still pending?

A. Yes, it was.

Q. And Mr. Borak had twenty one thousand some odd dollars in invoices still unpaid, still under—

A. Yes, that is true.

Q. —discussion?

A. Yes.

Q. Were those controversies settled between you two men?

A. They were settled between Mr. Borak and myself and my attorney, who was present, and Mr. Borak's attorney was present, in our office.

Q. And then under the terms of that settlement, were all controversies—well, how much—did you pay him some money?

A. We paid the invoices—we paid the invoices—the total amount of the invoices was approximately $21,000.00. They came up to our office and presented all the invoices and we wanted to clean the matter up,

I wanted to clean the matter up, and he dropped and we sat down for fifteen minutes to an hour to a half hour, I don't recollect how long, and we discussed the payment on the situation and—

Q. Well, look, let's not go into—

A. We ended up—we ended up by paying Mr. Borak, for his $21,000.00, seventeen thousand five hundred some odd dollars, and he was to release the million dollar lawsuit, saying that I called him a crook and a cheat.

Q. Well, now, wait a minute. Wait a minute. Let's keep quiet. Just calm down, sir. And you did sign a check for that settlement figure?

A. The check was given—no, I did not sign the check, no, I think it was a check machine.

Q. Okay. Well, anyway, you did pay the $17,500.00?

A. It was in the neighborhood of seventeen thousand.

Q. Was that supposed to settle everything between you?

A. Definitely, and we shook hands and I felt very, very much relieved at having no million dollar lawsuit against me.

Q. Now, there has been some testimony—I don't know just where it came in or how, but something about the Comet Envelope Company and controversy you had with them, or something,—

A. There was no—

Q. —or maybe about Allen Spiegel, or something.

A. Well, there was no controversy with the Comet Envelope people, we bought bags from them, they delivered one small lot of bags to Robbinsville, New Jersey, packing plant—I can't be sure of the exact dimensions, they were supposed to be twelve inches long, and when they arrived there, they were only

eleven and a half or eleven and a quarter, and we could not put enough onions in the bag to give full count, full weight in the bag, and we would not fill those bags and ship them out and put them out on the market, so we requested a reduction or credit on those bags, which the Comet people granted.

Q. One other thing in connection with that settlement that I overlooked asking you, did you advise the Bureau that you no longer wanted to prosecute those violations?

A. Yes, I had a call from commissioner Loughran and he said, "Do you want us to prosecute these violations?" I said, "I have no interest in the matter whatsoever," that Mr. Borak and I—

Mr. York:

If the Court please,—

The Court:

You have answered it.

You have answered the question.

A. —are completely settled.

Q. You told him that you had settled everything with Borak?

A. Yes.

Q. All right. Now, there has been a good deal of controversy here—and I don't know about controversy, but a good deal of talk, at least, about weight on these rolls and whether they were short weight and so forth. Were any bags—were any purchases made from Roto-Lith by weight, so much a pound?

A. All purchases of containers from Roto-Lith—bags, where I say containers—were purchased by

quantity, how many bags, so much per thousand, as shown on the invoice, and also the confirmations don't show any weight—

Q. Well, now, wait a minute. Don't argue the case, now.

A. All right.

Mr. Wagner:

That's all. Just a minute. That's all.

The Court:

Cross examine.

Cross Examination.

By Mr. York:

Q. Mr. Vahlsing Junior,—

A. You can call me Junior if you like.

Q. Is that your—what they ordinarily refer to you as?

A. Yes, sir.

Q. All right. This settlement figure that Mr. Wagner just went into with you on, the reduction of your debt to Roto-Lith, according to these invoices, of some $21,000.00, was to the extent of $3,015.74?

A. You are stating now—the essence of—this is what your question, you are stating to me if the total reduction was three thousand fifteen?

Q. Well, let me put it this way, I mean the difference between the amount you actually paid—

A. Yes.

Q. —and the amount you were invoiced for was $3,015.74?

A. I wouldn't say exactly, I don't have the records, but I would presume it might be correct, yes.

Q. You don't have any recollection of what that difference—

A. I know—I know that the invoices were approximately twenty one thousand, that is as I testified, and I remember the check was around $17,500.00, maybe a hundred dollars one way or the other.

Q. All right, sir. Now, out of that, you are aware that Mr. Borak passed to you an allowance from the Visking Corporation to him for these rolls being heavy, in the sum of $1,000.00, aren't you?

A. Absolutely not. There was no discussion, in that meeting, of Visking—

Q. I am just asking—

A. —or rolls or anything else.

Q. —if you are aware of it, Mr. Vahlsing.

A. All right.

Q. You say you are not aware of that?

A. I said "No."

Q. All right. You say you received this letter which is in evidence, marked P-2, and you read that letter, but you have no recollection of any allowance from the Visking Corporation?

A. I received that letter and I read that letter.

Q. Yes, sir.

A. That's all I would testify to.

Mr. York:

May I have that letter?

A. You ask why—

Mr. York:
Just a moment, now. Don't volunteer anything.

A. All right.

Mr. York:
You can argue the case when your lawyers—

A. Fine.

Mr. York:
—are asking you questions, if you want to.

A. Thank you.

The Court:
I will take care of that.

Mr. York:
Beg your pardon. Beg your pardon. I was trying to do two things at once, if the Court please.

Q. It is also a fact, Mr. Vahlsing, that in that difference, there was the sum of $330.98 freight allowance to you under your previous agreement with Mr. Borak that you would pick up these goods at his plant and take a freight reduction on them?

A. I think that is correct, yes. I don't know if it was six hundred. Five or six hundred dollars, yes.

Q. Well, you know it was substantial, don't you?

A. It was five to six hundred dollars. I won't testify whether five or six hundred dollars is substantial. It is five or six hundred dollars, yes.

Q. Wasn't your agreement with Mr. Borak that you would get a reduction from him on the common

carrier rate from his plant to wherever you wanted them delivered?

A. There was no reduction of any common carrier rate discussed. I can clarify that if you wish. May I clarify it?

The Court:

Well, I don't know whether he wants you to.

A. All right.

Q. There was no common carrier rate discussed?

A. I said there was no reduction on any common carrier rate—under the ICC, you cannot reduce any common carrier rate.

Q. I didn't say you reduced the rates, Mr. Vahlsing, I am just asking if you didn't have an agreement with Mr. Borak that instead of him shipping these items to you and you paying his delivered price to you, you would pick the goods up at his plant and convey them to your own plant?

A. Right.

Q. And that you would deduct from the invoices that you owed him the sum of freight—the ICC freight rate which he would have had to pay—

A. Correct.

Q. —to ship them to you?

A. Yes, sir, that is correct.

Q. You do that because you have trucks up there that you can dead-head back?

A. Correct, yes, sir.

Q. And that was in the sum of $660.98 of this reduction?

A. I am not sure of the exact figure. I said five or six hundred dollars, yes.

Q. Do you have any figures here that would indicate whether or not that is the exact figure or not? Do you have your books here?

A. I carry no books with me, sir, no. I believe we can get those records from the New York office, but I have no books with me now.

Q. That figure does sound like the figure?

A. I say it is possibly correct, yes.

Q. All right. Now, does the figure $80.44 mean anything to you in connection with this settlement?

A. It may to the extent that I think it is stated in that letter here, something like that.

Q. Yes, sir.

A. Yes, sir.

Q. It is one half of it, isn't it?

A. I don't know. I would have to read the letter again to refresh my memory. If you want, I will read it.

Q. There has been introduced in evidence here a letter of May 11th, addressed to F. H. Vahlsing, Inc., to your attention, concerning the claim that you had made that you had not gotten seventeen cartons of bags at Elna,—

A. It was at Mathis.

Q. At Mathis?

A. Yes, sir.

Q. Your man had signed a bill of lading for them at Mr. Borak's plant and picked them up, hadn't he?

A. My man had not, no.

Q. Had not signed the bill of lading?

A. No, had not signed the bill of lading. My man had not.

Q. You mean that that signature on there was forged?

A. I didn't say the signature was forged. I said my man had not—

Q. I am just—

A.—signed the bill of lading.

Q. I am just asking you, do you mean that the signature was forged? Can you answer that?

A. I haven't seen the signature. I don't know if it was forged or what bill of lading you are referring to.

Q. Then why do you say your man didn't sign it?

A. Because my man did not sign it. Would you like for me to clarify that question?

Q. If you will tell me, do you mean that this isn't your man that picked up these boxes?

A. A trucker picked up these boxes, a leased trucker picked up these boxes.

Q. You leased the truck?

A. The organization leased the truck, yes.

Q. Well, Mr. Vahlsing, between you and the organization, I mean the organization.

A. I leased the truck from a broker, so my man did not sign the bill of lading.

Q. In other words, that is your conclusion?

A. Yes.

Q. You don't think it was your man and—

A. I know it wasn't my man.

Q. Do you contend that the truck that you leased was Mr. Borak's man?

A. No,—I don't contend anything. You are asking me if my man had signed the bill of lading on that truck and he had not.

Q. You don't deny that the man who leased the truck to you and who was driving the truck for you signed that bill of lading?

A. He wasn't driving the truck for me. I leased the truck from a truck brokerage outfit with a set fee to deliver these bags from New York City to Mathis, and my man didn't sign the bill of lading.

Q. Didn't you also lease the driver?

A. Beg your pardon?

Q. Didn't you also get a driver with the truck?

A. The truck brokerage man—

Q. All right.

A. —got—

Q. All right.

A.—a driver. It couldn't get to Texas without a driver.

Q. All right. Now, at the time you made that settlement, Mr. Vahlsing, you were aware of everything you have testified concerning this claim of short count that you are making now, weren't you?

A. Repeat the question, please.

Q. Haven't you testified on direct testimony that you were aware of this claim of short count that you are making here—

A. I was—

Q. —at the time that you made the settlement?

A. Certainly I am aware of it.

Q. You were at the time that you made this settlement?

A. Yes, I was, I—we had been shorted by these bags, according to the Bureau of Weights and Measures, and according to our various—

Q. Just a moment, sir.

A. All right.

Q. I am just asking you—

A. All right.

Q. —if you were aware of your claim at the time that you made this settlement?

A. Yes, I was.

Q. And in net figures, how much do you claim that you got as a result of your claim of short count from Mr. Borak, in this settlement?

A. Borak—we started out—I might—

Q. Just answer me in figures, if you please, sir. How much, in dollars, do you claim that you got from the invoices—

A. May I have a pen—

Q. —of $21,000.00?

A. May I have a pen and a sheet of paper, please?

(Mr. Wagner furnishing paper and pencil to witness and conferring with witness out of hearing of the reporter and jury.)

A. Approximately $1,500.00 to short count. I requested four thousand.

Q. May I see the paper?

A. (Passing instrument to counsel.)

Q. Is this the figures?

A. Yes, just figures, that's all.

Q. What is your $500.00 representative of?

A. $500.00, end up with that, the approximate freight allowance.

Q. Which is $660.98?

A. Right, that's right, fine.

Q. What does your $250.00 figure mean?

A. That was half of the loss which I recovered after paying this trucker his full freight from Roto-Lith's plant down to Mathis, which does not include the fourth of the loss on the cargo.

Q. All right. Thank you.

A. I paid the trucker—that was half, what he allowed, and I paid the trucker in full, because I believe the trucker, and he went over to see Mr. Borak and told him—

Q. Just a moment, Mr. Vahlsing. You allowed $250.00 for that, in your computation?

A. Approximately. I don't remember.

Q. Don't you know that that figure was actually $474.32?

A. I am $12.00 off. I'm sorry.

Q. $474.00 against $250.00 and you say you are—

A. He only allowed—

Q. Let me ask the question, will you, please, sir?

A. All right.

Q. That is $12.00 off?

A. That is $12.00 off, that he allowed us half, yes.

Q. The half that he allowed you was $474.32, wasn't it?

A. I don't think so.

Q. Mr. Vahlsing, you are talking about 17 cartons here, you are aware of that?

A. Yes.

Q. Now you are complaining now because you had to pay the truck that you leased to carry these cartons down?

A. Yes, I had to pay the broker and the broker—I can explain, if you—

Q. No, sir, thank you.

A. You should let the people know what it is.

Q. All right, sir. After—did the trucker sign the receipt, Mr. Vahlsing, the bill of lading for the cargo?

A. I don't know. I have never seen the bill of lading, but I would presume that no one would let a shipment get away from a plant without having someone sign a receipt.

Q. Well, you know he did, don't you, Mr. Vahlsing?

A. I don't know. I just said I didn't. Where is the receipt? Show it to me and I will tell you. Produce the receipt.

Mr. York:
Do you have the receipt here?

A. Produce it.

Mr. York:
We will produce it, Mr. Vahlsing.

Q. Now, in connection with this $1,800.00 that you were allowed in this settlement, on the rolls, the printed rolls that you think were so thick that you couldn't—

A. We weren't allowed any $1,800.00 on any printed rolls.

Q. You did not?

A. We were not allowed any $1,800.00 on any printed rolls because we didn't buy by the printed roll, we bought by the bag.

Q. Well, then, tell me this, what was all this testimony that Mr. Meyer was talking about, and all these other people about the bags that you bought in rolls, printed just like this?

A. Give me this and I will explain it exactly.

Q. Did you buy them like this, Mr. Vahlsing? That's all I am asking you.

A. We original—well, I will sit down and I will start from the beginning.

Q. Thank you, sir. Did you buy these—

A. We originally purchased—we originally purchased the bags in boxes, and during July, there were a certain number of rolls like this which had bags on them, each one of these is a bag, you cut it off and you have a bag. Instead of Mr. Borak making those rolls up into bags and delivering them to us, we accepted to take the rolls at $1.00 per thousand bags,

net, for our labor to make the bags out of the rolls. As far as weight of the rolls, it had nothing to do, they were to be—supposed to be so many bags in that roll.

Q. You know that if this film is a little bit thicker, you won't get quite as many bags?

A. I don't buy things that way, I bought at so many thousand bags and I didn't buy anything thick or a thin film, wide or short.

Q. Then you say your own witnesses are not telling the truth when they say that if these rolls are thicker—

Mr. Wagner:

Wait a minute. That is arguing with the witness.

The Court:

Don't argue with him.

Q. Let me ask you this, Mr. Vahlsing, in this letter that you say you got and read—

A. What letter, please?

Q. This one.

A. I received the letter, and I—I—I received the letter and I read the letter. I called my attorney and he said that this letter had—

Q. Now, just a moment. I didn't ask you what you said to your attorney, Mr. Vahlsing. I am merely asking you if you got the letter.

A. Well, it was after I got the summons.

Q. All right. All right.

A. And that 98%—

Q. Now, this letter contains this paragraph, Mr. Vahlsing, "On the same bill of lading, roll stock in

the amount of 1493.6 pounds was invoiced on our invoice number 4116—"

A. Would you read that letter over here so I could read it? I can't catch all these little figures.

Q. "—and Mr. Fred Meyer—"

A. "On the same bill of lading—" yes, go on.

Q. "On the same bill of lading, roll stock in the amount of 1493.6 pounds was invoiced on our invoice number 4116 and Mr. Fred Meyer claims he received only 1468.3 pounds, a difference of 25 pounds, or $26.00." There is no complaint about the rolls, is there, about the weight, only on bags?

A. I didn't say there was any—there was no complaint about weight, I said—I said that if we purchased bags, we purchased them by the bag, as far as weight consideration, I had no interest in it, and I did the purchasing on the bags.

Q. All right.

A. I bought so many bags.

Q. All right. Now, do you see he says, "Mr. Meyer has complained—"

A. Let me see that. I didn't see that. "Mr. Meyer—however, Mr. Meyer—"

Q. "Mr. Meyer has complained—"

A. All right.

Q. You are following me right along,—

A. Go ahead.

Q. "—that the yieldage—" that is the bags you get out of the rolls, isn't it "—that the yieldage that we estimated from this, which we based on Visking corporation information—"

A. I didn't buy it from the Visking Corporation. I bought it from Mr. Borak,—

Q. I haven't—

A. —and I bought so many bags.

Q. I haven't asked you a question.

A. All right. Well, you were talking Visking. I had nothing to do with Visking. This letter was after I got the suit and I turned everything to my lawyer and the guy sued me for a million dollars for a crook that I never called him.

Q. Are you through?

A. Go ahead.

Q. Now, Mr. Borak is saying that he based the yieldage estimate on Visking information, because you know that these rolls came from the Visking Corporation.

A. Oh, don't say that, please, I don't know where Mr. Borak—

Q. Oh, you don't—

A. —got—

Q. All right, you don't know, then. "—Visking Corporation information of 7.2 pounds per thousand, was running 8.15 pounds per thousand." The film was running heavy. All right, I'm just asking you, that's what he means, isn't it?

A. I had no interest in it, I didn't buy it from Visking, I bought so many bags from Mr. Borak and he short counted me. What is all this other business?

Q. Now, continuing,—

The Court:

Counsel, let's not interrogate him any further about the letter.

A. Certainly.

Mr. York:

All right. May I read the balance of the paragraph?

The Court:
Well, do you want to read it to him or to the jury?

Mr. York:
To the jury.

The Court:
I thought it was already in evidence.

Mr. York:
It is, Your Honor.

The Court:
Well, you can read after—

Mr. York:
It has in it about the Visking Corporation and I wanted to read that the letter says that he is passing his complaint to the Visking Corporation.

Mr. Abbott:
That's all right, it is already in evidence.

The Court:
All right.

Q. Now, in the face of that letter, the fact that you have read it, you are familiar with it, you still contend—

A. I read it. I didn't say—

Q. Do you still contend that you don't know anything about this $1,800.00 credit which the Visking Corporation allowed Mr. Borak and he passed on to you?

A. I know absolutely nothing about a Visking Corporation, am not interested, didn't buy it from the Visking, and I don't know Mr. Borak's dealings with the Visking Corporation. Mr. Borak dealt with me, sold me the bags; I didn't deal with the Visking Corporation. He guaranteed so many bags in a box and he short counted me. What else could I want? I don't want anything else. When I deliver ten pounds of potatoes, there is ten pounds in that bag, and no nine and nine eights, and when a housewife buys my merchandise in the stores, they get fifteen pounds in a peck of potatoes, and there ain't no—

The Court:
All right.

A. —fourteen seventy five.

The Court:
Now, let's stop—

A. Yes, sir. I'm sorry I get excited.

The Court:
I am too.

A. All right.

The Court:
Now, don't get excited,—

A. Okay. I'm sorry.

The Court:
—and listen to the question.
A. Go ahead, sir.

The Court:
Do you sell onions by the pound or by the bag?

A. We sell onions by—

The Court:
I'm just asking you a simple question.

A. All right. We sell them by the bag, sir, yes, sir.

The Court:
The bag.

A. Yes, sir.

The Court;
Well, that answers my question.

A. But there must be 50 pounds in a bag, sir.

The Court:
Sir?

A. There must be 50 pounds in a bag of onions, and if you deliver a man 49 pounds of bags in an onion, you must rework the whole car before you can sell that car of onions.

The Court:
All right.

A. We don't ship any 49—

The Court:

That's all I asked you. Any redirect?

Mr. York:

I have one more question on another matter, if the Court please.

Q. Mr. Vahlsing, you know a good deal about these boxes, don't you?

A. I know a good deal about those boxes?

Q. Yes, sir.

A. I know they are boxes, there is bags in them. If that is a good deal about it, I wouldn't know.

Q. And when this box that has been marked by the clerk as an exhibit in this case was put on the table over here yesterday afternoon,—

A. Yes.

Q. —in the midst of all your testimony you were putting on of Max Lutz having had bags in his possession for eight or nine months or more and then delivering them to your laboratory man Mr. Turner, who counted the bags in them,—

A. Yes.

Q. —and of your own employees' testimony that they had counted bags that had been in possession—in your possession for a long time,—

A. Yes.

Q. —and didn't have as many bags in them—

A. Yes.

Q. —and we asked Mr. Turner if those bags were sealed,—

A. Yes.

Q. —you knew what we were talking about, didn't you?

A. What do you mean by that?

Q. Let me just ask you this, why did you try to put your hand into this box yesterday when you were sitting over there in front of Mr. Borak?

A. Why did I put my hand in a box?

Q. Yes, sir.

A. Where in the box? Let me see.

Q. Just answer the question.

A. Which box?

Q. Why did you try to put your hand in any—

A. Let me see. I want to look at the box.

Q. Where did you try to put your hand in the box?

A. Well, roll the box over and let me see, please. Where did I put—I looked at the box and I asked my attorney if it is all right to touch the box.

Q. Is that what it was?

A. I asked my attorney if it is all right to touch the box and I looked at the box.

Q. You were just touching?

A. I asked my attorney if it was all right to look at the box.

Q. Will you just answer my question, please? Did you try to put your hand in this box yesterday afternoon?

A. I tried to put my hand in the box?

Q. Yes, sir.

A. No, definitely not.

Q. Why did you try to put your hand in the box?

A. I didn't put my hand in the box. The box was closed.

Mr. York:

All right, sir. No further questions.

Mr. Wagner:

No further questions.

The Court:
All right, you may take your seat.

The Witness:
Sorry I got excited.

Mr. Wagner:
Now let the record show, Mr. Abbott that you demanded yesterday that I bring the rest of these boxes down and I refused at that time because I was hoping we would get through with the evidence last night, but if you want them, I have had them brought up here this morning for you, sir,—

Mr. Abbott:
Thank you, sir.

Mr. Wagner:
—and with that, Your Honor, I think we rest, if you will give me a few minutes to talk with my co-counsel and—

The Court:
All right.

Mr. Wagner:
That's all, Your Honor. Defendants rest.

The Court:
All right, defendants rest.

Mr. Abbott:
Do you wish to go forward at this time, Your Honor?

The Court:
Well, I would like to put in a little more time. I have got naturalization at two o'clock and sentencing at three. There were too many people, I couldn't stop them.

Mr. Abbott:
Sir?

The Court:
Too many people coming in that had already been notified to come in at two and three o'clock.

Mr. Abbott:
Yes sir.

The Court:
And we couldn't stop them.

Mr. Abbott:
Yes, sir. Do you anticipate going forward for another hour, or nearabouts? Twenty minutes? I could put on one witness, perhaps.

The Court:
Well, let's see how far we can go.

Mr. Abbott:
All right. I would like to recall Mr. F. H. Vahlsing, Senior, Your Honor.

The Court:
Mr Vahlsing, Senior.

F. H. VAHLSING, SR., a witness who had heretofore testified herein, resumed the stand and testified as follows:

Direct Examination.

By Mr. Abbott:

Q. Now, Mr. Vahlsing, you are the same gentleman that testified yesterday?

A. I believe so.

Q. We asked permission to re-open, or to call you back.

A. All right.

Q. Mr. Vahlsing, you were asked questions yesterday about whether you had had a visit with Mr. Borak in McAllen Texas, in 1955.

The Court:

A little louder, please.

Mr. Abbott:

Yes, sir.

Q. In 1955, regarding a discussion of a retraction on this matter. Do you recall what you stated at that time?

A. Well, can I tell the whole story or must I say "Yes" or "No"?

Q. Well, do you recall making the statement yesterday in your conversation? That's what I mean.

A. What statement?

Q. That you—well, what your statement was.

A. What is it?

Q. What was your statement?

A. What is it? Repeat it.

Q. All right, what was your statement that you made yesterday regarding that?

A. I don't recall what statement you got reference to.

Q. All right, when you were a witness on direct examination by your counsel and you were asked various questions.

A. Well, I can't answer a question that I recall—

Q. Everything that you responded to was true, wasn't it?

A. I hope so.

Q. Is there any part of your testimony that you wish to change today?

A. No.

Q. None whatsoever?

A. No, I don't think so.

Q. Well, I want to know whether you want to change any of it today.

A. No, I don't think so. I don't think so. Whatever statements I made, why —

Q. Well, what do you mean, you don't think so?

A. I don't think so. I don't want to make no changes. I don't think—

Q. Then you stand on exactly what you said yesterday, is that right?

A. Absolutely. Absolutely.

Q. With no changes?

A. No changes.

Q All right, sir. I had your testimony yesterday transcribed,—

A. Yes.

Q. —Mr. Vahlsing, and during the course of it—let me take a moment to find it, please—you were asked if you had made a call to Mr. Borak and had made a statement to him that unless he withdrew this suit, that you would break his company.

A. I said that was a lie.

Q. That's what you say?

A. I said that was—

Q. What did you say on that occasion?

A. I didn't say anything.

Q. You didn't talk to him?

A. Not—not—not in that sense.

Q. Well, what did you say to him?

A. I don't recall what I said to him.

Q. Then what Mr. Borak said you said to him is a lie, as he recalls it?

A. I said it was a lie because I never made that statement in any way, shape or form.

Q. All right, sir.

A. Never made that statement in any way, shape or form I was going to break Mr. Borak or do anything of that kind.

Q. Now, what about the statement that he said that you said to him on the telephone, "Borak, you don't have a chance in Texas because your lawyers are my lawyers"? Now, did you make that statement to him?

A. I did not.

Q. Didn't make it at all?

A. Absolutely not.

Q. Now, yesterday, you testified you said, "Don't recollect it. Don't think so."

A. Well, you didn't ask me that question.

Q. I am asking you the same question that you were asked yesterday.

A. No, you didn't ask me that question. That question didn't come up yesterday.

Q. By your counsel, on direct examination, you were asked that question.

A. By my counsel?

Q. Yes.
A. I thought you—you were telling me you asked me that question.
Q. No.
A. You told me you asked me that question.
Q. No, I did not.

Mr. Wagner:
Just a moment. I will ask that Mr. Abbott be fair with the witness and not select one question and answer, but read him the succeeding questions and answers—

A. Yes.

Mr. Wagner:
—right there in that connection.

Q. All right, sir you were being questioned by Mr. Wagner, your counsel in this case,—
A. Uh huh.
Q. —or at least the counsel for Texas Plastics,—
A. Uh huh.
Q. —and there was a number of matters that preceded this, but the one that I am interested in, Mr. Wagner said to you, "Okay. That you told him that unless he withdrew that suit, that you would break him and his company."
A. I said that was a lie.

Mr. Wagner:
Well, let him read the questions and answers.

Q. And you answered, said, "Who? I did?"
A. Uh huh.

Q. Do you recall that?

A. Yes.

Q "Mr. Wagner: That's what he says you said to him."

A. Uh huh.

Q. "Answer: That's a lie, unequivocable lie."

A. Lie.

Q. I want you to follow the testimony here? Skipping an immaterial matter here. Now, resuming, Mr. Wagner to you, "That you better withdraw that suit in Texas, 'or I will break you and your company.'"

A. I say that is a lie.

Mr. Wagner:

Let him read the questions and the answers.

Q. And then the answer, "That's a lie." Now, that is your statement?

A. Absolutely.

Q. "Mr. Wagner: And that you said further, 'You haven't got a chance in Texas, why, your lawyers are my lawyers.' did you make a statement like that to him?"

"Answer: Don't recollect it. Don't think so."

Mr. Wagner:

Read him the next question. That's what I want to do, be fair with the witness. Read him the whole story, now.

Mr. Abbott

Well,—

Mr. Wagner:
Read the next question and answer.

Q. "You might have said something about the lawyers being the same?" And then Mr. York, "If the Court please, we object to leading." And the Court: "I sustain the objection." And Mr. Wagner, "I withdraw the question."

Mr. Wagner:
That's right.

Q. The answer that I am—the part now that I want to refer to is going back, "And that you said further—" this is Mr. Wagner—"—'You haven't got a chance in Texas, why your lawyers are my lawyers.' Did you make a statement like that to him?"

"Answer: Don't recollect it, don't think so."
Was that your testimony yesterday?
A. You've got it there.
Q. Today you say you didn't say it?
A. Who said so?
Q. Today, a moment ago, I asked you—
A. You didn't ask me that question.
Q. All right, sir, I will pass that question.
A. All right.

Q. "Question: That on another occasion, you told him that you had found that it was true that Mr. Meyer had called him a thief and a crook and that you now wanted to print a retraction of it.

"Answer: That's a lie."

A. Right.
Q. Is that what you said yesterday?
A. You got it there.

Q. All right. "And that just a week ago, Monday a week ago, you called him from Corpus and offered to do the same thing.
"Answer: He called me." Is that correct?

A. That's correct.
Q. He called you. "You weren't in on the final settlement with Borak in New York, were you?" And you interrupted and said, "No." "Didn't Junior handle that?"
"Answer: No, I didn't handle that. I don't know anything about it at all."

A. Yes.
Q. Now, I have read to you the substance of some questions I want to address to you, and you have affirmed to me that what you say in here is true is that correct?
A. That's correct.
Q. And all of the—you have had a chance to reexamine your testimony as the Court reporter transcribed it and it is still true today, isn't it?
A. Whatever I said there, that is the truth.
Q. And you have no further explanation to offer?
A. No,—explanation to what? You ask me a question,—
Q. As to your answers, sir. I am asking you if you want to explain one of them.
A. What's that?
Q. Or two of them.
A. What's that?
Q. All of them.

Mr. Wagner:
Well, now, Your Honor, I am—

Mr. Abbott:
I am asking—

Mr. Wagner:
Just a minute. I am going to object to this badgering of the witness. Ask him a question and ask him if—

The Witness:
Ask me a question, that's all.

Mr. Wagner:
—he wants to change it.

The Court:
I overrule the objection.

Mr. Wagner:
He hasn't seen the transcript that Mr. Abbott has, I haven't seen it.

The Court:
Well, you have read it to him verbatim?

Mr. Abbott:
I read it to him.

The Court:
That's all right, I overrule the objection. This is cross examination.

Mr. Wagner:
All right.

The Court:
I don't know just what counsel has in mind, but—

Q. Now, Mr. Vahlsing you have stated that what I have read to you, as given to me by the Court reporter as what you said yesterday, is true, and you make no change of it, is that correct?
A. That's correct.

Q. I refer you now specifically to the question by your counsel, "And that just a week ago, Monday a week ago, you called him from Corpus Christi and offered to do the same thing?"
"Answer: He called me."

A. No, wait a minute, now. He called me, now, he called me the week before. He called me the week before, or ten days before. He said he was going on a vacation. He was going—said he called me on a vacation, that's what I had reference to when he called me. It was ten days before,—
Q. I asked you—
A. —he called me.
Q. I asked you, sir, a moment ago,—
A. And he was going to call me on a vacation. That's where I was mistaken on that. That's where I was mistaken on that. He called me.
Q. Now, as a matter of fact, the question that was addressed to you by your lawyer was "That just a week ago, Monday a week ago, Monday a week ago, you called him from Corpus Christi and offered the same thing."

A. I didn't offer him anything.
Q. And you said, "He called me."
A. Now, wait a minute.
Q Now, that is not true, is it?
A. That is not true.
Q. That's right.
A. That is my error.
Q That is not true?
A. But he called me ten days before that and that's what I had—
Q. And you did call him on this matter, didn't you?
A. I did call him on that matter,—
Q. At 9:00 o'clock a.m.?
A. Yes, but let me give you the explanation.
Q. I have no need for an explanation.
A. Ten days—ten days before that,—

Mr. Abbott:
Your Honor, I object to him volunteering an explanation.

The Court:
Yes,—

A. The reference that I called—

The Court:
Wait a minute,—

A. He called me ten days before—

The Court:
Just a moment. When I am ruling and I am talking, you don't talk. Now you can make an explanation

when your attorney calls for it. Anything else, counsel?

Q. And the only reason, sir, that you are changing this statement is because we have found out that you did make that call, isn't it?

A. I made that call, but he called me before that —

Q. All right, that's enough.

A. —that is the reference—

Q. Just answer my question.

A. That is the reference—

Q. Let your lawyer ask you the question.

A. I thought that was the call when he called me.

The Court:

Wait a minute. Both of you stop.

Mr. Abbott:

All right, sir. I have no further questions.

The Court:

We will let the jury judge why he—

Mr. Abbott:

I have no further questions.

The Court:

All right. Now, counsel, do you want to—on redirect?

Mr. Wagner:

Yes, Your Honor.

Cross Examination.

By Mr. Wagner:

Q. Did Mr. Borak call you?

A. He called me.

Q. And on yesterday, I asked you a question about whether he had called you on Monday a week ago, which would be about ten days before yesterday. Well, I asked you whether you had called him, and you said, "He called me"?

A. That's right.

Q. All right. Now, do you say that you are incorrect on that Monday a week ago?

A. On Monday a week, because—I was mistaken on that. I was mistaken on that, because I—I—

Mr. York:

If the Court please,—

A. He called me—

Mr. York:

—object to the unresponsive—

A. —ten days before that —

The Court:

I will let him explain.

A. —and said he was going—

The Court:

I will let him explain.

A. —on his vacation,—

Q. All right, now,—

A. —and what I wanted to do about the case.

Q. I know that, but wait a minute, you say about ten days before that, he called you?

A. He called me, and that is the case that—when he asked me that question, I was under the impression that that was the call when he called me, see?

Q. All right, and about ten days before that, he had called you?

A. He had called me.

Q. Said he was going on a vacation?

A. He was going on a vacation and he asked me what I wanted to do, whether I wanted to withdraw the suit, see, and I says "Mr. Borak, I don't know what I want to do, whether I want to withdraw the suit or not." I says, "I will have to think it over," and he says, "Let me know. Let me know whether you are going to withdraw the suit, because I got to make preparations to go down to Brownsville and attend the suit, and I don't like—I don't want to go down there,—"

Q. That's all right, that's enough of the details.

A. "—if you are going to withdraw the suit," and he says, "call me within, now, ten days" that was the last conversation I had with him, "call me within ten days."

Q. All right.

A. "Call me within ten days, what you are going to do," see?

Q. All right.

A. Then I called him last Monday, see, I called him last Monday, and I said, "Harry, what have you decided?" Because under discussion with him—

Mr. Wagner:
Wait a minute. Wait a minute. We don't want to go into all that.

A. All right.
Q. Now, when you say about "withdraw the suit," are you talking about this very suit here?
A. This very suit here.
Q. Well, he is the plaintiff in this susit isn't he?
A. Yes, well, he wanted to withdraw it, because he was saying if I would pay his lawyers' fees,—
Q. Now, wait a minute,—
A. —he would withdraw the suit.
Q. —don't go into the details of that, please.
A. All right.
Q. He was asking you if you wanted to settle with him?
A. Wanted to settle with him, that's right,—
Q. That's what you meant when—
A. That's the first call that he made.

The Court:
If you are going to go into any of this settlement business, I am going to open it up and let the jury have it all.

Mr. Wagner:
Well, all right.

The Court:
I am just telling both of you, now,—

Mr. Wagner:
All right.
—you are going to open up settlement negotiations that has been objected to heretofore and if you are

going to open it up why, don't make any objection hereafter.

Mr. Abbott:
Well, certainly, Your Honor, we object to going into any settlement negotiation.

The Court:
Well, he did the other day, and we have got enough to try without it.

Mr. Wagner:
That's right, Your Honor, but—

The Court:
Don't consider anything, lady and gentlemen, about either side trying to settle the case. That would discourage people from talking to one another, is the reason behind the rule. I sustained the objection the other day of Mr. Wagner on that very point and I now sustain one on the other side. I think we have got enough to try without going into all these conversations about settlement.

Mr. Wagner:
No further questions.

Mr. Abbott:
We have no further questions, Your Honor.

The Court:
All right, you are excused.

Mr. Wagner:
Can this gentleman be excused now, Your Honor?

The Court:
Yes.

Mr. Abbott:
Yes, sir, Your Honor, as far as we are concerned.

The Court:
All right, you are excused.

Mr. Wagner:
All right, you can stay in the Courtroom now, Mr. Vahlsing.

Mr. Abbott:
May I be excused for a few minutes, Your Honor?

The Court:
What was that about the Courtroom, counsel?

Mr. Wagner:
I told him he could stay in the Courtroom.

The Court:
I thought you wanted him excused.

Mr. Wagner:
I do.

The Court:
All right. Now, I want you,—come up, please. I want you to understand this, I am going to excuse you and let you stay in the Courtroom, but I want you and every other witness on both sides to understand you are not to talk to other witnesses in the case about

your testimony or their testimony. I want that thoroughly understood.

Mr. F. H. Vahlsing, Sr.:
Well, Your Honor, I don't have to stay here. I would just as soon stay outside.

The Court:
Well, that's all right, now, I just want you to understand—I have had some conversations with the attorneys about that and I am just telling you because I don't want any misunderstanding about it.

Mr. F. H. Vahlsing, Sr.:
Well, Your Honor, I will leave the Courtroom. I say, I will leave the Courtroom.

The Court:
Well, you are still under the rule, then,—

Mr. F. H. Vahlsing, Sr.:
Sure.

The Court:
—about talking to the witnesses.

Mr. F. H. Vahlsing, Sr.:
Oh, yes,—

The Court:
I want that understood.

Mr. F. H. Vahlsing, Sr.:
—sure.

The Court:
All right How many more witnesses do you have, counsel?

Mr. Abbott:
Two, Your Honor.

The Court:
Who are they, may I ask that?

Mr. Abbott:
Mr. Borak in rebuttal and Mr. Petty, who has been present in the Courtroom, and because of the inquiry as to these bags, I would ask leave of the Court to make him a witness on a matter that I did not know would arise and had no reason to name him as a witness.

The Court:
Who is Mr. Petty? I don't know him.

Mr. Abbott:
Mr. Petty is seated in the back.

The Court:
Well, what is your--
Mr. Abbott:
He is an employee of Roto-Lith, Your Honor, and cumulative testimony on an item that Mr. Borak will testify about.

The Court:
Well,—

Mr. Abbott:
I don't believe that it would prejudice the defendant, his being here.

The Court:
Well, I will pass on that when the time comes. In the meantime, let him remain outside.

Mr. Abbott:
Yes, sir.

The Court:
I will put you under the rule too, Mr. Petty.

Mr. Abbott:
Will you come around and be sworn? Did you want him sworn now, Your Honor?

The Court:
Yes, we will swear him now and put him out of the Courtroom and put him under the rule and I will pass on what I will let him testify to later.

(Whereupon the witness Petty was sworn by the clerk.)

Mr. Abbott:
I will call Mr. Borak now, if you want to go ahead.

The Court:
Let's go forward with it a little while.

Mr. Abbott:
Mr. Borak.

The Court:

I would like to get in as much time as we can. Now, Mr. Borak,—by the way, bring that man Petty back. I forgot to give him the instructions, after all.

Mr. York:

If the Court please, I don't think we are going to use him, if the Court wants to go ahead.

The Court:

Well, I don't want him talking to other witnesses. Now, Mr. Borak, you answer the questions—I am going to tell you the same thing that I tried to tell these other witnesses, and I tried to tell you the other day, just answer the questions and don't try to make any speeches.

Mr. Borak:

Yes, Your Honor.

The Court:

All right, don't try to argue the case. Leave that to your lawyers. Mr. Petty, don't discuss your testimony or—with anybody except the lawyers in the case. You may talk to either one of them freely, but don't talk to any other witnesses or anybody else about your testimony. The same thing I have just told Mr. Vahlsing. All right.

HARRY BORAK, a witness who had heretofore testified herein, resumed the stand and testified as follows:

Direct Examination.

By Mr. Abbott:

Q. Mr. Borak, you are the plaintiff in this case and testified earlier in this trial?

A. Yes, sir.

Q. There was testimony brought out by the defense counsel and their witnesses during their presentation that you had been up in Mathis and saw this Simpson—some fellow named Simpson count bags up there. Do you know him?

A. I never saw him.

Q. Never saw him before when?

A. Before today—yesterday.

Q. All right, sir. There was testimony also, Mr. Borak, that this counting that Simpson was supposed to have engaged in, and when you were supposed to have been present, was around April 29, 1954. Where were you at that time, were you in Texas?

A. I came into Texas after May 12th.

Q. After May 12th; you were not down here at that time, if the bags were counted?

A. No, sir.

Q. All right, sir. How do you know that?

A. The last trip I made to our Dallas office was December or January, and May 12th is my birthday and I would not leave my family for a week or two weeks trip until after my birthday.

Q. I see. And you were not down here and did not see or know Simpson?

A. I was down the middle of May, 15th, 18th or 20th.

Q. Now, there has been much testimony adduced about two boxes of bags, maybe 21 others, here, from Max Lutz. Without relating conversations, tell what happened, as well as you know, on that time that I have already testified to about you coming down here.

The Court:
Pick it up when you got here.

A. When I arrived at McAllen?

The Court:
McAllen.

A. I arrived at McAllen, Mr. Abbott met me at the airport, we went to Mr. Lutz' shed. I had asked Mr. Abbott to get ten or twelve people that could count bags. These people had been arranged for, these high school boys, by Mr. Abbott. I went into Mr. Lutz' office with Mr. Abbott and said to Mr.—

Mr. Wagner:
Now,—

A. Offered to Mr. Lutz—

Mr. Wagner:
—I am going to object to the conversations between him and Mr. Lutz and the changing of the phraseology of it still leaves it hearsay. The witness said, "I said to Mr. Lutz," and then he says, "I offered to

Mr. Lutz, which is only another way of testifying to what he said to Mr. Lutz.

The Court:

I sustain the objection. Just tell what was done.

A. I wanted to count bags in the cartons in his stock room, to determine whether there was a shortage there or not.

The Court:

You didn't get to count them?

A. I was not permitted to count them. I then asked for the moneys that was due me.

The Court:

And a settlement was made of the account, checks given?

A. I was given checks and notes for all of my money that was due me.

Q. All right, sir. And in that connection, the—there was a last note of $5,000.00?

A. The last note of $5,000.00—

Q. And is that the subject of a lawsuit that you filed against Mr. Lutz?

A. That is right, sir.

Q. Did I represent you in that suit?

A. No, sir.

Q. Some other lawyer did?

A. That is right, sir.

Q. And that is the last note given on the merchandise sold and delivered to him?

A. That was the last note of a group of $15,000.00 worth that he did not pay, he wanted more time extension, we sued him for it and he put a counter claim in for being short.

Q. Now, then, with respect to that putting in a counter claim for being short, now, you came down here in May of 1955 with respect to an inquiry from me and you related how you wanted to count bags and Mr. Lutz wouldn't let you?

A. That is right, sir.

Q. Now, without reference to that incident, when was the first time that you heard, subsequent to that, that Mr. Lutz was claiming he had a short count?

A. One year later, three weeks ago.

Q. And when was that?

A. The end of last—

The Court:

With reference to the suit against him. When was that with reference to the suit against him? Isn't that what you mean?

Q. Yes, sir, did he file a cross action against you for shortage after you had sued him?

A. Yes, sir.

Q. And he was claiming around eleven or thirteen thousand dollars shortage?

A. That was three weeks ago, a year after he paid me.

Q. All right, sir. All right, sir, now, we have had a great deal of discussion, it appears that the defendant says that they buy bags in rolls, and it doesn't make any difference whether the film is heavy or light, they are supposed to get that many rolls when it comes out down there. You did sell them rolls in printed form, didn't you?

A. That is right.

Q. And you did sell them so many pounds, and on a conversion factor, figure out how many bags it would make?

A. The equivalent.

Q. The equivalent to so many bags?

A. That is right, sir.

Q. And you allowed them, because you did not make the bags, on those rolls, one dollar a thousand for the converting process?

A. That is right.

Q. Which you did not do?

A. That is right.

Q. And you sold them a substantial quantity of material in that form, as printed material, did you not?

A. $18,000 worth.

Q. $18,000 worth, and on this material, there has been testimony that you turned over to them a $1,800 bill as a settlement of some kind. Tell me what it was and where it came from.

Mr. Wagner:

Bill?

A. Well, I received the complaint from Mr. Meyer that the rolls, the poly was running heavy and he wasn't getting the amount of bags out of it that he should. I turned that complaint over to the Visking Corporation,—

Q. Is that the company referred to in your letter?

A. The manufacturer of the poly,—that the poly is heavy and the customer is complaining he is getting less bags. The Visking corporation, after discussing it with me and seeing some samples, asked me to settle the matter in the best way that I could and

they would refund it, and I will go on—as I am on oath now, if this is not true, I will declare myself a perjurer and drop the suit—the Visking corporation gave me $1,800 to give to the Vahlsing corporation.

Q. All right, sir, and that eighteen hundred was transmitted in connection with the three thousand—

A. On the $3,000.00 settlement, I gave them freight discount, yieldage, $1,800.00, and $80.44 for what they claimed they were short in bags, for cartons that I sold them in bags.

Q. And that $80.44 was based upon information you had—

A. That Mr. Meyer gave me.

Q. Just a moment—from Mr. Meyer that he was 3.76% short on this and 254—

A. That's right.

Q. —per cent short on that,—

A. And Mr. Vahlsing.—

Q. Now, just a moment.—and that was a result of that claim, those bags were ultimately counted and they came out, according to the Bureau, 2.92, and could have been as little as 1.92?

A. That is right, sir.

Q. All right, sir.

A. I do want to say this, that Mr. Vahlsing Junior, at the time of the settlement, said to me, "Harry, what do you care what you give us on the yieldage? You are not paying for it. Visking will give it to you. You told me." And I told him it was a question of honor, that I could not just go and say "Five," "Three," I have got to account for it, and I based it on ten per cent, they said they were short nine per cent, seven per cent, in yieldage, I figured an easy ten, $18,000, ten per cent, $1,800. I advised the Visking corporation and they gave me my check.

Q. All right, sir.

A. I turned the money over to the Vahlsing corporation.

Q. You turned—Visking paid you and you turned—

A. Yes, sir.

Q. —it over to Vahlsing?

A. They gave me $3,000 less, I entered it in our books, plus $1,000, which was given to us by the Visking corporation in reference to this claim. It can be proven by the Terre Haute books of the Visking corporation, and I still stand on what I say, that I will withdraw the suit—

The Court:

Well, you have answered the question.

Q. Now, you have stated that you don't know Mr. Simpson. Did you ever count bags up at Mathis with him?

A. Who is Mr. Simpson?

Q. That is the gentleman that testified yesterday.

A. I never saw him in my life.

Q. Did you ever count any boxes with—

A. I never counted any boxes with Mr. Vahlsing Junior, Senior, Mr. Meyer, or anybody in the Vahlsing group.

Q. Well, what did you do?

A. On the boxes?

Q. Yes.

A. There was two boxes—in this May trip, I was in Elsa with Mr. Vahlsing Senior,—

Q. Yes.

A. —we were at the shed around 12:15 at night, Mr. Vahlsing Senior was showing me his corn operation, the way they were taking this corn, and due to

worms, they were cutting off an inch or two inches on each end and using the good four inch middle. They were going hotsy-totsy on it. He showed me the filter system, they ice them, they cool them,—the machines that took the husks off, and then cut them. A conversation took place with this shook man, that the way this corn deal is going, and they have to pack it before the worms start eating it any further, so that—if they leave it go too long, they will have to cut so far that there will be nothing left of the corn, and that "We had better check our bags to see what we got and maybe get more." Mr. Vahlsing and I walked out to where he had the corn bags. He counted 12 cartons of five thousand each and he says to me, "You know, we are going to need more bags and need them here in four days, because we have got to keep this going while the corn is here and we don't have to cut away too much," and then he says to me, "How do you know, Borak, I got five thousand bags in any one of these boxes?" I says, "Why don't you take a couple and count them? We have to stay here anyway." He says, "Good idea," and he called up a couple of men, Mr. Vahlsing and I went back into his office, he pleaded with me to call my factory at 12:15 and ask them if they could please put corn bags on right away, because if he didn't get five hundred thousand of them, he would be in a jam and not be able to use the rest of the corn, the worms would eat it up. I called my office, I broke a press up, I spoke to the night man—

Mr. Wagner:

Your Honor, I hate to interrupt, but this isn't rebuttal. We have rested and they are going into some new thing here.

The Court:
Well,—

Mr. Abbott:
It is rebuttal, Your Honor, as to what actually—

The Court:
I think it is rebuttal, but he is making—

A. All right, sir. Well, anyway, I arranged for him to get the five hundred thousand bags. His shed man came back—no, his shed man—

The Court:
Ask a question, Mr. Abbott, and you answer the question.

Q. You and Mr. Vahlsing didn't count the bags?
A. No, sir.
Q. Someone else did?
A. That is right, sir.
Q. What was the result of that count, if you know?
A. One box was 20 bags over and one box was 40 bags over.
Q. And there was no complaint registered by Mr. Vahlsing?
A. The first complaint—
Q. What was the question that he said to you, "How do I know that I am getting five thousand bags in his box?"
A. That is right, sir.
Q. And you said, "Count them"?
A. I said, "Count them."
Q. All right. Now, I want to ask you about the operation of your counter on your bag making machines and how the spoiled bags are replaced.

A. You want me to explain that to you?

Q. Well, very quickly, very quickly.

A. Any bag that comes off the machine that is not in a usable condition, that the operator can catch, long seam or short seam, is thrown underneath the machine, in a box. We have a sign up on the machine, if we are packing the bags three thousand or two thousand or fifteen hundred, whatever it may be. When the counter reaches three thousand, the operator picks the box up underneath the machine, he counts six bags, eight, ten, twelve, throws them into a box of scrap, and takes from a pre-made box, under the machine, the same amount, and puts it back into the carton. The counter is turned down to zero and they start over again.

Q. And that is your practice now?

A. That is our practice.

Q. Has that always been your practice?

A. That has always been our practice, with this one exception, in the beginning, we didn't pre-make the bags, when he picked the bags up, if he was short eight, he would run the count eight over to make them up. Now, we pre-make them.

Q. You pre-make the bags—

A. We pre-make a box of bags of the brand and we put it underneath the particular machine.

Q. All right, sir. Now, let me ask you just a couple of more questions, Mr. Borak. About how many customers does Roto-Lith have?

A. Approximately four hundred to four hundred and fifty.

Q. And have any of your customers, other than F. H. Vahlsing, Incorporated, and Max Lutz, ever made a claim for shortage or because of a short count, against your firm?

A. In the 18 years that I am in business, the only claims that I have had is the Vahlsing claim and this now, the Lutz. I have never had a claim for short count, short weight or anything.

Q. You have had a claim for some bad bags, have you not?

A. Oh, yes, that is normal.

Q. Where the seam didn't fit?

A. Oh, yes, a customer will get bags and claim his breakage is running 2%, 1%.

Q. Do you have some customers that are well known in the United States?

A. Yes, sir.

Q. For example?

A. Well, we sell the A. & P.

Q. What is it, the great Atlantic and Pacific Tea Company?

A. The Atlantic and Pacific.

Q. How long have you sold it, sir?

A. This is our eighth year that we are selling them.

Q. And have you ever had a complaint from them?

A. Never had a complaint. We just recently got more business.

Q. Just recently got more business?

A. We are shipping carrot—

Mr. Abbott:

I have no further questions.

Cross Examination.

By Mr. Wagner:

Q. If I understand you about this Mathis trouble your point is that you were not there around April 29th?

A. My point is that I have not counted any bags.
Q. Yes, sir.
A. In Mathis.
Q. I was coming to that.
A. Neither was I involved with anybody that did count bags in Mathis.
Q. Well, am I correct that you are definite in this, that you were in Texas in either January or February of 1954? Didn't you say something about your Dallas office?
A. I would say December or January.
Q. That is December of '53 or January of '54?
A. December of '53 or January of '54.
Q. And then that you were not in Texas any longer until after your birthday?
A. No, I said that at May 12th—I wouldn't have made a trip prior—a few days prior to May the 12th. I would have let it go 'til after my birthday. It is possible—in other words, if I made the trip, it is possible that I was here the middle of April,—
Q. Middle of April?
A. —or after May the 12th. It is my recollection that I came down about May the 19th, because they wanted me to go over and see these bag machines erected at the Elsa plant of the Texas Plastics.
Q. All right. Now, wait a minute. Let me get back again now. You say now you might have been here April the 19th?
A. It is possible. It is a long way back.
Q. But you don't think you would have been here as late as April 29th because that was getting about two weeks from your birthday?
A. No, no, I didn't say that.
Q. Well, what—

A. I say that it is my recollection that I would not have been here May 6th, May 7th, May 8th, or something like that. I would have been home, because it was my birthday May the 12th.

Q. Well, all right, didn't this man Simpson say that it was about April 29th when he counted these bags?

A. I don't know. I never saw Simpson.

Q. Well, do you deny that you—you admit you were in Mathis on some date, do you not?

A. I went to Mathis with Mr. Vahlsing to get his plane to fly to Elsa.

Q. I understand. I say again, you do admit you were at Mathis, with Mr. Vahlsing, sometime in about April or May?

A. I don't admit it. I don't—I have confusion as to the exact date.

Q. Again I am saying, I am not asking for the exact date, and you have explained to us that your birthday was May the 12th, and you are sure that you weren't a few days before that or a few days after that, you are sure of that?

A. That is right.

Q. All right.

A. It is my recollection that I was down after the 12th of May.

Q. All right, but you don't say positively that you were not here on April the 29th?

A. Well, a positive statement to a thing like that is difficult to do because you are back two and a half—

Q. I am sure it is.

A. Two and a half years on me, and a question of two weeks, either way, I can't say positively.

Q. Exactly.

A. It is my best recollection that I was down in Texas either January—December of '53, January of '54,—

Q. All right.

A. —and then I came back after my birthday, which was after May the 12th,—

Q. All right, I understand that,—

A. —so there is a possibility that it may have been—

Q. In April?

A. —in April, there is.

Q. All right. Now, I am clear on that. Now, you are also clear that you met Mr Vahlsing at Corpus and went over to Mathis with him for the purpose of taking his plane down here to the Valley?

A. That is right, sir.

Q. And you are also clear and positive that while you were in Mathis, no bags out of Roto-Lith boxes were counted there in your presence?

A. There wasn't a bag, there wasn't a box—I didn't even see a box of bags in Mathis.

Q. That is all right.

A. I didn't see any bags in Mathis. The shed wasn't working. We walked—we walked there waiting —we were waiting for a truck to come in with some rolls to bring over to Elsa, so that they can start running their own bag machines. That was the purpose of me being in Mathis.

Q. You were at Mathis?

A. I was at Mathis, waiting for Vahlsing's truck to make a delivery of rolls so we could take some rolls in Vahlsing's plane and fly it over to Elsa, and I, in any small manner, help them erect or advise them how to make poly bags at the Texas Plastics Company.

Q. All right, and you were waiting for Vahlsing's truck at the Vahlsing packing shed?

A. No, I wasn't at the packing shed.

Q. Where were you?

A. I went out on the farm with—Mr. Vahlsing took me out to show me the acreage, how they grow carrots.

Q. All right.

A. And then we were in the office, waiting for this truck to come in.

Q. The office at the packing shed?

A. Well, it seems to me the office was across the road or something.

Q. Well, it is right together?

A. No, sir, the office was across the road, because when I walked into the packing shed, there was water all over the place and I had a light pair of shoes on and I didn't want to go in,—

Q. I see.

A. —there was water all over the floor, and Mr. Vahlsing said, "Let's wait in the shed—in the office," whatever it was.

Q. All right. How do you know that the shed was not operating if you didn't go to the shed?

A. I say we started to walk in, there was water, there was no operation there, they weren't packing carrots, Mr. Vahlsing had told me when he took me out to the acreage that they can't pull the carrots because it rained two days ago and if you walk in it, you will sink up to your knees,—

Q. All right.

A. —so "You can't have any carrots now," so the shed was down.

Q. The shed was not operating and you waited to see the Vahlsing truck come in, but it didn't come in?

A. Yes, it did, and when it came in, I took a carton on my shoulder, we went over to the plane, we put it in the plane and went to Elsa. That was my trip to Mathis.

Mr. Wagner:
No further questions.

Re-Direct Examination.

By Mr. Abbott:
Q. All right, sir, I just want to ask that—this exhibit P-9, Mr. York asked Mr. Vahlsing if he did anything to the box while it was up on the desk. Did you observe anything?

Mr. Wagner:
He didn't ask him any such question. He asked him if he stuck his hand in it.
Q. Well, all right, I will state it that way, did you observe Mr. Vahlsing stick his hand in the box?
A. I saw Mr. Vahlsing Junior put his hand in the box like this and go like that, right on the table here, and I hollered at him and he stopped.

Mr. Wagner:
The record says, now, of course, that—excuse me. Go ahead.

Mr. York:
Mr. Meyer says he put one finger in it and we will accept that—

Mr. F. H. Vahlsing, Jr.:
At the edge.

Mr. York:

All right.

Q. All right, the point is that he reached at a vulnerable point in that box, didn't he?

A. That is right, sir.

Q. Why is it a vulnerable point?

A. Because—

Q. I would like for you to demonstrate—get it—

The Court:

Put it up on there.

Q. All right, just a minute.

A. This is the point that anybody in the bag business knows that you can take bags out without anybody knowing it; it is a custom among salesmen going into sheds when you want a competitor's bag, you just go like this and out comes the bag (illustrating), they can take a hundred, two hundred, four hundred, and every salesman knows it and every salesman does it, and when you look at the seal, if you turn it around, no one knows the box has been tampered with.

Q. One more question. Prior to May the 14th, 1956, which is the occasion on which we now understand Mr. Vahlsing called you in New York, instead of you calling him, as he originally testified, when was the last time you spoke to Mr. Vahlsing Senior, was it ten days before?

A. May the 14th, Monday, at ten o'clock, New York time, or 10:30, my switchboard operator said—

The Court:

No, that is not necessary.

A. —"Mr. Vahlsing Senior is on the telephone."

The Court:

You talked to him Monday a week ago, then, that is what you are—

A. May the 14th, a week ago Monday.

Q. Now, I am talking about prior to that, when was the last time prior to that you talked to him?

A. I don't think that—the prior time that I talked to Mr. Vahlsing was when I saw him in Elsa at the Casa, four months ago, when he invited me to go to dinner and go to his shed.

Q. All right, sir.

A. I haven't spoken to him since.

Mr. Abbott:

No further questions.

Mr. Wagner:

No further questions.

Q. Did you call him ten days prior to May 14th?

A. The last time I saw him or spoke to him was three months prior to May 14th.

Q. Did you call him on the telephone—

A. I never called him.

Q. —ten days prior to May 14th?

A. No, sir.

Mr. Abbott:

All right, sir. Any further questions?

Mr. Wagner:

No questions.

Mr. Abbott:
All right, sir. We rest.

The Court:
Anything further from the defendant?

Mr. Wagner:
Your Honor, this—Mr. Abbott, would you step over here?

Mr. Abbott:
Yes, sir.

(Whereupon a conference was held between the Court and counsel, at the Court's bench, out of hearing of the reporter and jury.)

The Court:
Both sides close the evidence?

Mr. Wagner:
Yes, Your Honor.

The Court:
Now, lady and gentlemen, we have, at last, closed the evidence in the case, on both sides, and as I told you, I have a naturalization ceremony at 2:00 o'clock, some seventy five or a hundred, I understand; then I have a number of criminal cases in which I must pass sentence, so—I have set those for 3:00 o'clock, and sometimes those sessions run two or three hours, so I am not going to have you come back this afternoon. We will start the argument of this case in the morning at 9:00 o'clock. Everybody understands that now. Nine o'clock, Mr. Reporter. So, in the mean-

time, you forget about it, don't discuss it, don't permit anybody to discuss it in your presence, don't check into any bags or cartons or bags, don't get anybody to illustrate to you about whether they can slip in or out of these boxes. Just forget about it until in the morning, when you hear the arguments of the attorneys, and then I will instruct you as to the law and then you can talk about it all you want to in the jury room. By the way, I will have air-conditioned quarters for you, too, so you retire quietly at this time. Court will remain in session until the jury has retired.

(Whereupon the jury retired from the Courtroom and the following proceedings were had outside the presence and hearing of the jury.)

The Court:

Gentlemen, pursuant to my request yesterday morning, the plaintiffs tendered several requested instructions. I have had none from the defendant.

Mr. Wagner:

I have them now, Your Honor.

The Court:

All right.

Mr. Wagner:

I thought surely if he tendered any, he was going to give me copies of them. I asked him about them.

The Court:

Well, they wrote them out, most of them, in longhand, and I guess they thought they wouldn't have time.

Mr. Wagner:

I saw him carrying a slew around and I asked him about them yesterday, I thought they were, and—now, Your Honor, I don't want to request any issues, because I seriously want to present a motion for instructed verdict in this case. Nothing new or startling about it, I have made the point in the motion for the instructed verdict at the close of the plaintiffs' case. I am serious about it and I do not want to waive that motion,—

The Court:

You want to re-urge the motion now?

Mr. Wagner:

Yes, Your Honor, and not request issues and thereby—

The Court:

Oh, no. What I want is requested instructions on law points, and if you have got any issues you want to request, I will—

Mr. Wagner:

I have fixed it in the way of instructions, Your Honor, rather than special issues. In fact, I have been somewhat puzzled as to how, from the plaintiffs' standpoint, this case is going to be presented to the jury, whether from the standpoint of issues on these various charges, did he make this one, did he make that one, did he make the other one, or whether it is simply going to be lumped, or—

The Court:

Well, I think it is a—I think it is on the whole picture as to whether he made one or more statements that are of such a nature as to be slanderous, per se, or slanderous in fact, that is statements reflecting upon or detracting from his honor and integrity, the reputation for honesty and fair dealing of the plaintiff, and if they did, or if they made statements, in effect, that they were crooks or cheap chiselers, I think those things are libelous per se.

Mr. Wagner:

Of course I do not, Your Honor.

The Court:

Sir?

Mr. Wagner:

I do not.

The Court:

You don't think it is libelous per se to call a man a crook?

Mr. Wagner:

No, Your Honor.

The Court:

Well, I would like to know why?

Mr. Wagner:

Well, Texas—oh, maybe I am misleading the Court. I am not talking about libel. We don't have a libel case here.

The Court:
You don't think it is libelous—

Mr. Wagner:
It is a slander case.

The Court:
You don't think it is slanderous per se to call a man a crook?

Mr. Wagner:
No, Your Honor. Do you want the case that says so?

The Court:
Well, I would like to see some law on it.

Mr. Wagner:
I will be glad to cite Your Honor, 226 SW (2nd), that holds exactly that, and if it affected a man—calling him a crook, in that 226 2nd, Your Honor, the man was an insurance agent who was collecting premiums for his company, you see, a great deal of—he had to be honest. The head man came down to this little town and they had a knock-down drag-out and the head man says, "You are a liar, a cheat and a crook—" no, wait a minute, a thief. "A liar, a thief and a crook. You are not fit to wear that ring," referring to the man's Masonic emblem, and "I am going to run you out of the lodge, and furthermore, I am going to have a letter on the way to Austin tonight that will run you out of business and you can never get a job in the state of Texas."

The Court:
Now, let me see, 226 what, Southwestern Second?

Mr. Wagner:
Now, if calling a man a crook, that kind of man, is not libelous per se—slanderous per se, how can this case?

Mr. Abbott:
Billington versus Houston Fire and Casualty Insurance Company, 226 SW (2nd) 494, is that the one you are referring to?

Mr. Wagner:
Yes.

Mr. Abbott:
Your Honor,—

The Court:
Well, I don't want to hear any argument about it. He is urging the motion for instructed verdict and I am fully overruling it and carry along with the case, try to get a verdict in this case while we have got a jury here.

Mr. Wagner:
Now, Your Honor, mechanically, on these requests, I have another problem, I want to present the requests on behalf on each of the defendants separately.

The Court:
That is all right. I don't think it needs to be in writing.

Mr. Abbott:
Hand them to each of the defendants separately?

Mr. Wagner:
No.

The Court:
He wants them filed separately as well as jointly.

Mr. Wagner:
Do you want me to run these things twice and—

The Court:
No.

Mr. Wagner:
—say, "Now comes the defendant,—"

The Court:
No, it is in the record here, you just dictate that into the record, you make a motion for a verdict, for an instructed verdict, on the ground the evidence is not sufficient to support a verdict for the plaintiffs, or either of them, against either defendant.

Mr. Wagner:
That's correct, for the reasons set out in the motion for instructed verdict filed in behalf of each defendant at the close of the plaintiffs' case.

Mr. York:
There was no motion filed at the close—

Mr. Wagner:
Oh, yes.

The Court:
He had a motion.

Mr. York:
Yes, sir, but it was only on behalf of Texas Plastics, it wasn't on behalf of Fred Meyer, according to—

The Court:
No, it was on behalf of both of them.

Mr. Wagner:
I wrote it up twice, once—

Mr. Abbott:
We just got the copy for Texas Plastics.

Mr. York:
I beg your pardon.

Mr. Kennedy:
No, sir, I gave you two copies, one of each.

Mr. Abbott:
There is two of them in our file.

The Court:
Well, let me have your requested instructions, now; your motion is overruled and I want to get your instructions and I will read any cases you want me to read tonight.

Mr. Abbott:
Your Honor, may I state, with respect to the case that he cited to the Court, that an exception to that rule, the general rule, is that oral words, however

appropriate, are not actionable, without proof of special damage, unless they impute to another the commission of a crime. An exception, however, to the rule, as well established, perhaps, as the rule itself, is that words which affect a person injuriously in his office, profession or occupation, are actionable per se, so they are—

The Court:
I will read the case.

Mr. Abbott:
All right. We just wanted to point out to the Court, in relation to considering the motion, that the testimony of our witnesses was in the future that these things would occur.

Mr. Wagner:
May we have his stipulation, counsel, for the record, Mr. Abbott?

Mr. Abbott:
I beg your pardon?

Mr. Wagner:
In the interest of time, I have one set of requested special instructions, of which I will furnish you one. One, two, three, four, five.

Mr. Abbott:
Yes, sir.

Mr. Wagner:
And I have left, in blank, it just says, "Comes now the defendant," and instead of writing it up twice

and presenting the same reques in behalf of each defendant, that it may be stipulated that this request will apply to both defendants, as though—

The Court:
Either or both.

Mr. Wagner:
—individually requested.

The Court:
Either or both, yes, sir. All right. All right. I will see you gentlemen—

Mr. Wagner:
How about late this afternoon—no, of course you want to do some studying, I imagine, on the charge.

The Court:
I want to do a little studying. I will see you tonight or early in the morning.

Mr. Wagner:
I would sure like to have some idea—

The Court:
I will see you at 8:15 in the morning and tell you what I am going to charge the jury.

(Whereupon, at 1:00 p.m., May 24, 1956, Court was recessed, as to the case on trial, until 9:00 a.m., May 25, 1956.)

Morning Session—May 25, 1956.

(The following proceedings were had in the Court's Chambers, out of hearing of the jury.)

Mr. Wagner:

I want the record to show that before any charge is given to the jury, I take the position that, as a matter of law, these statements to the salesmen, and the statements to customers, are privileged, as a matter of law, not absolutely, but conditionally, and if the Court refuses to so instruct the jury, then, alternatively, I request instructions that these statements on these occasions be submitted to the jury as an issue of fact, and I further, still, of course, am standing on my motion for an instructed verdict, that the statements made are not slanderous per se, and that there is no proof of actual damage, and that we are entitled to an instructed verdict on those grounds, and the other grounds set up in the motion.

The Court:

Well, in that connection, let the record show, as to the contention that the words are not libelous per se,—

Mr. Abbott:

Or slanderous,—

The Court:

—that the contention is principally based upon the case of Billington versus Houston Fire and Casualty Company, 226 SW 494, which holds that, in the absence of innuendo, allegations in the pleading of the plaintiff, the words "liar and crook" were not libelous

per say. The Court is of the opinion that this Court is not bound by the State Court Rules of pleading and that, under the liberal pleadings allowed in this Court, the matter of innuendo has been taken care of by the evidence from all the circumstances in the case and the testimony of the defendants' witness Meyer that he did not intend, by the words he used, to cast any imputations upon the plaintiffs' reputation or honesty or integrity, or to create the impression that they would cheat and defraud their customers, by short count or other methods. That is all I got to say about that. I just wanted the record to show my reasons.

(Further discussion off the record, after which the following proceedings were had in open Court.)

The Court:
All right, Mr. Juror, you say you wanted to ask a question?

Juror:
Yes, sir, about some of the testimony that I am not clear on.

The Court:
Yes, sir.

Juror:
Can I ask it now or later?

The Court:
Now.

Juror:
Well, about these boxes.

The Court:
Yes, sir.

Juror:
This gentleman used those boxes; what kind are they?

The Court:
What was that?

Juror:
What kind of boxes do they use for this packing, these bags in?

The Court:
Well, these are some of the boxes here.

Juror:
I know that, but what kind do the other people use, that never was brought out in the testimony, at least, if it was,—

The Court:
I don't believe there is anything in the record about other people.

Juror:
Well, they said—not about the boxes, but lots of people manufacture those boxes, and I just wondered if these boxes were manufactured specially for these people or for—for the purpose, or for—

The Court:
For all their customers?

Juror:
All their customers.

The Court:
You mean what kind of boxes does the plaintiff use generally for all its customers?

Juror:
Yes, sir.

The Court:
Do you want to make any showing on that, gentlemen?

Mr. York:
May I confer with counsel just a moment?

The Court:
Do you want to offer anything on it?

Mr. Abbott:
Yes, sir, I will be glad to, Your Honor.

The Court:
Well, I will permit you to do it. The juror wants to know—if the jury would like to know, we can—

Mr. Abbott:
Re-open as to that issue only?

The Court:
Yes, sir.

HARRY BORAK, a witness who had heretofore testified herein, resumed the stand and testified as follows:

Direct Examination.

By Mr. Abbott:

Q. Mr. Borak, the question has been asked if this is the—illustrative of the standard type of box that you furnish for all of your customers; is it or is it not?

A. That is the box.

Q. Is there any material difference at any time?

A. Only to the change of color in the—

The Court:

Speak out, please.

A. Only to the change of color. When the mill runs out of the yellow board, they give us the same box in brown board; then we have the same box as that in a shorter size, to take a less quantity; some boxes we back three thousand, some boxes we pack two thousand; they are all the same box except for the color.

Q. All right.

The Court:

Do you make your own boxes?

A. No, sir. No, Your Honor.

Juror:

Judge, that is not the question I wanted to—

The Court:

I misunderstood you, then.

Juror:

I want to know what sort of boxes the defendant used, if they used that same box, from the same company, or are these manufactured especially for him?

The Court:

All right. Any questions of this witness?

Mr. Wagner:

No. There is a difference in size, of course, some of them are as low as fifteen hundred to the box.

Juror:

Yes. The size don't make any difference. I mean the—

A. The only difference—the question is whether our competition uses the same box?

Juror:

Same soft of a box, built the same way as that.

A. Well, the only difference is that we are now, instead of stapling the bottom, as you see it now, this past week, we have instructed our shipping department to gum tape the bottom.

The Court:

Now, he is asking about, if you know, what type of box does the Texas Plastics use.

A. I don't know.

The Court:

All right. Any questions, Mr. Wagner?

Mr. Wagner:

The boxes come knocked down, I guess, from the factory?

A. The boxes come flat.

Mr. Wagner:

And you put them together, you staple them—

A. We staple them together, fill them, and then we gum tape the top side.

Mr. Wagner:

All right.

Juror:

Another question. Is that box sealed when it is—when you can run your hand in there and pull something out, is that sealed?

The Witness:

Am I to answer that, Your Honor?

The Court:

Well, I can't answer it. I don't know anything about it.

Mr. Abbott:

What was the question?

Mr. York:

Is the box sealed when you can run your hand in the bottom of it and pull the bags out?

A. Well, it is sealed, because of the fact that that box, in that condition, would travel three of four or five or eight thousand miles, without breaking; there had never been a thought, prior to certain happenings,

that you could take bags out without breaking the seal. Now, this past week, we are taping both top and bottom, but for eighteen years, we have been delivering our cartons in that clip style.

Mr. Wagner:
Well, I have this question. You haven't been making polyethylene bags for eighteen years, have you?
A. Well, we packed our cellophane bags the same way, sir.

Mr. Wagner:
All right.

The Court:
All right.

Mr. Wagner:
Does the jury want to know about that Texas Plastics box?

The Court:
Well, he has asked the question; if you want it in evidence.

FRED J. MEYER, a witness who had heretofore testified herein, was recalled and testified as follows:

Direct Examination.

By Mr. Wagner:
Q. Mr. Meyer, you heard the inquiry from the juror. What type of box—how do the boxes that Texas Plastics uses compare to this box here?

A. The boxes we receive from the box manufacturer come knocked down, they are exactly the same as these, except that our board may be a little heavier and it is a brown board rather than a yellow.

Mr. Wagner:
Is that all? That's all.

The Court:
All right. Now, lady and gentlemen, we come to the argument of the case, which is an important part of the trial of any case. The right to be represented by an attorney is guaranteed by the constitution to both sides of any controversy in Court and a part of that representation is the argument or the summing up of the evidence by the attorneys. They will discuss the evidence, the deductions they think you should draw from it, the deductions they draw, and why they think you should drew the same deductions that the attorneys have drawn. They are not witnesses and what they say in their arguments is not testimony, but it is argument in an effort to convince you as to what the right verdict in the case should be. Now, you are not bound to accept what the lawyers say, because they are not witnesses and it is not sworn testimony, but you are bound in all good faith to give them a patient hearing, and after you have heard their arguments,—I have heard jurors say, lots of times, "I don't pay any attention to the lawyers." Well, that isn't—that isn't the right attitude. All of us should be willing to listen to reasonable and plausible arguments. It might be that we are wrong, or the other side is wrong. I frequently get quite a bit of benefit out of arguments. We have been in arguments in chambers, about the law involved, and it

has been helpful to me from both sides, so pay close attention to the arguments and then I will instruct you as to the law. At this time, I will recognize counsel for the plaintiff, Mr. Abbott.

(Whereupon argument of counsel was heard, after which the following proceedings were had.)

Afternoon Session—May 25, 1956.

The Court:

Now, lady and gentlemen of the jury, reference has been made to the fact that the charge, in this Court, comes after the argument. That is true in all Federal Courts and is required by rule of the Court in order that the Judge may, if necessary, comment on the evidence, the arguments, and try to clarify the issues for the jury. I like the system. I have practiced in the State Courts and I like the system here better. Of course all are privileged to their own choice about it and it is true that, in the State Court, the charge of the Judge must be reduced to writing and a copy given to the jury. Here the charge is oral, you have nothing to take with you to the jury room except the exhibits in the case and the form for your verdict. I like that, too. I think it makes it more informal and perhaps I can speak more clearly to you than when I am reading something.

I am going to try to make this charge as clear as I can. It is rather an important case from the standpoint of both parties, all the parties, and it is a complicated case, a type of case that I have never tried before, either as a lawyer or as a Judge, so I have been doing some work trying to figure out the law that is applicable and advise the attorneys

in advance of what the substance of my charge would be. I made some notes that I am going to check from, but they are not in such form that they would do you any good in the jury room. You might not understand them.

Now in this case, the contentions of the parties—I am going to state them as briefly as I can—and not to limit you to my summary of them—and as clearly as I can—the plaintiff, or the plaintiffs, rather, in the case, say that the defendant Meyer, as general manager of the Texas Plastics Company, and in the course of his duties as such, made certain derogatory statements substantially to the effect that the plaintiffs were crooks and cheap chiselers, and other remarks made in connection with it, with that charge, and that in the background and under the circumstances in which the statements were made, they were intended to mean and did mean that the plaintiffs would deliberately and intentionally cheat and defraud customers and were calculated to impute dishonesty and a lack of integrity to the plaintiffs in their business dealings and injuriously affect their reputation for honesty, integrity and fair dealing; that these statements were made, one of them, to the customer Ed Boler, and others to the salesman Blackwell and other salesmen, with the purpose in mind that they would, in turn, disseminate this information to others, or these charges to others.

The plaintiffs say that these statements and their implications were not true and that they were slanderous per se, or in themselves, taken in the light of the background and the circumstances under which they were said and the connection in which they were spoken, that they were slanderous in themselves, and that they have suffered actual damages to their repu-

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tation in the respects named; and furthermore they say that Mr. Meyer made these statements maliciously, with malice, and that therefore the plaintiffs are entitled to recover what is known as exemplary damages or punitive damages.

Now the defendant denies the statements, in substance, as made—as contended to have been made, by the plaintiff, or that Meyer charged the plaintiffs with being crooks and cheap chiselers, or, in the background, the intent and purpose of them, the meaning of them was that the plaintiffs would cheat and defraud their customers; they deny making these statements as claimed by the plaintiff and deny that what Meyer said was calculated to impute dishonesty or lack of integrity to the plaintiffs or to injure their reputation for honesty, integrity and fair dealing. And then the defendants further say that whatever Meyer said, if he said what the plaintiffs say he said, they say then that they were true—that is one defense; secondarily, that even if they were not true, that Meyer honestly believed them to be true and communicated them to the salesmen and to Ed Boler and other customers in good faith under such circumstances that they were made under circumstances known in the law as conditionally or qualifiedly privileged—I will define that to you shortly—and that they deny that—expressly deny that Meyer uttered the alleged slanderous statements with malice.

Now I charge you that if Meyer said, to Boler or Blackwell, in substance, as claimed by the plaintiffs, that they were crooks or cheap chiselers, and that such statements, considered in the background and under all the circumstances in which they were made, were intended to mean and did mean that plaintiffs would deliberately and intentionally cheat and de-

fraud, and were calculated to impute dishonesty and lack of integrity to the plaintiffs in their business dealings and injuriously affect their reputation in such respects, then I charge you that such statements, as a matter of law, were what is known as libelous per se, in themselves, and that the plaintiffs would not be required to prove any special or particular damage in order to be entitled to recover, if the statements were false.

Now if you find that Meyer made the statements substantially as alleged and that their meaning and intendment was that the plaintiffs would cheat or defraud their customers by short weights or by other methods, and were calculated to impute dishonesty or lack of integrity to the plaintiffs, and affect, injuriously, their reputation for honesty, integrity and fair dealing in their business dealings, if you find that he did that, and you further find that the statements were not true, then you will find for the plaintiffs, according to the standards that I will presently give to you, and unless you find for the defendant, or defendants, on these grounds:

First, if you find that the statements were true, you will find for the defendants.

Now secondly, as to this qualified privilege, there are two sets of—two different types of statements here, one made to the salesman Blackwell and others, and the other made to Boler, and perhaps another customer, I can't remember his name.

Now we have, in this state, what is known as qualified privilege. There is a general privilege that is not applicable here; we speak of privilege, members of Congress, for instance, on the floor, or members of the Legislature, can't be held accountable for damages for what they say on the floor, in debate;

fair reports of public proceedings and things like that, even though untrue, are not actionable; but now then we come to this question of qualified privilege, and under the law, a communication made in good faith, on any subject matter in which the person communicating has an interest, is privileged, if made to a person having a corresponding interest, even though it contains a matter which, without this privilege, would be actionable. The essential elements of a conditionally privileged communication may be enumerated as good faith—if it is made in good faith and believed to be true—an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and a publication or utterance of the statement in a proper manner and to proper parties only. This has been stated a little differently in this language, from 27 Texas Jurisprudence, Page 649, a part of Section 25: "A communication made in good faith on any subject matter in which the person communicating has an interest, or with reference to which he has a duty to perform is privileged, if made to a person having a corresponding interest or duty, even though it contains matters which, without this privilege, would be actionable."

Now, for instance, as an illustration of a conditional privilege, you have had someone in your employ; someone inquires about them; you have got an inquiry; you make a statement in reply to the inquiry; it is privileged if you—even though you have misstated the facts, if you honestly and sincerely and in good faith believe the statement and are not acting from a malicious standpoint.

Now I think, as a matter of law, that the statements made by Meyer to the salesmen were conditionally privileged and will not give rise to dam-

ages for slander, even though the statements, or part of them, were not true, unless Mr. Meyer, who was making the statement, made it with malice toward the person spoken about.

Now if you—even though you find that he made these statements complained of to the salesmen and that they were not true—and that they were true—of course that in a defense, but even though they were true, completely, still they wouldn't give rise to a cause of action for damages unless the statements were made by Meyer with malice toward the plaintiff and if he honestly believed them to be true.

Now as to the statement made to Ed Boler, the customer, I am not going to tell you that, as a matter of law, that statement was privileged. As I told you, the test is a communication made in good faith, on any subject matter in which the person communicating has an interest or with reference to which he has a duty to perform, is privileged, if made to a person having a corresponding interest or duty, even though it contains matters which, without this privilege, would be actionable.

Now if you find from the evidence that Meyer made the statements in good faith, believing they were true; that he had an interest in communicating that fact to Mr. Boler, or other customers, and—or a duty to do it, and the other person had a corresponding interest or duty, then I instruct you that that—that those statements made to Boler, likewise, were privileged, unless they were made with malice; and of course if the defendant didn't believe them to be true at the time, then this qualified or conditional privilege would not apply at all, if he made them with malice or not believing them to be true.

Now as to—I have spoken of malice here; I want to define malice to you. Malice—as I told you, even though these statements were conditionally privileged yet if Mr.—rather—I withdraw that "as I told you, even if they were conditionally privileged"—if Mr. Meyer made these statements, and they were not true, and he made them with malice, of course the privilege would not apply. Malice, which avoids the privilege, is actual or express malice, existing as a fact at the time of the communication and which inspired it. Malice exists where one casts an imputation which he does not believe to be true, or where the communication is actuated by some sinister or corrupt motive or motives of personal spite or ill will, or where the communication is made with such gross indifference to the rights of others as will amount to a wilful or wanton act. Now it doesn't—malice doesn't necessarily mean that the statement was made out of hatred, personal spite or ill will, but it need be no more than the antiphrasis or opposite of good faith. Malice can't be inferred alone from the speaking of inflammatory words on a privileged occasion, but it, like any other issue, can be inferred from all the circumstances in the case, the relation of the parties, the circumstances attending the making of the statement, the words and acts of the defendants before and after the time of communication, and any other circumstance in your memory, from the evidence before you, which may throw light on whether or not these statements were made with malice or with such wanton and gross disregard of the rights of others as to amount to wilfulness.

Now in the event you find for the plaintiffs—in the event you find for the defendant, that the statements were not true or that the defense of qualified privi-

lege is good, of course your verdict will be for the defendants.

If you find for the plaintiffs, then you will proceed to determine the amount of damages you will allow. The law allows three kinds of damages. First, what is called or known as nominal damage, where a person has been slandered, where derogatory statements of this type and character have been made and reflect upon their honesty and integrity and their reputation in those respects, for fair dealing, then the jury might feel that maybe no particular damage has been done, and then, in that event, they are authorized to find what we call nominal damages; sometimes it has been—it is a dollar, not particularly in this case, I am not talking about it, it might be ten now, or just some nominal amount; or actual damage may be awarded, and in considering—in the event you award damages to the plaintiff, in considering the amount of actual damage, if you decide to award actual damages, you may award to the plaintiff Roto-Lith such amount as will compensate it for any damage to its reputation for honesty, integrity and fair dealing, including any loss of profits in the past, or that will, in all reasonable probability, occur in the future, as a proximate or natural result of the alleged slander. You may award, to the plaintiff Harry Borak, such sum as, in your judgment, will adequately compensate him for damage to his reputation for honesty, integrity and fair dealing, and in addition, any sum that, in your judgment, will reasonably and adequately compensate him for any mental pain or suffering that he may have sustained as a natural and proximate result of the alleged slander.

I mentioned loss or profits a moment ago in connection with Roto-Lith. There is some evidence about a loss of profits. Whether all of it is attributable to this—these alleged slanders or not is for you to say. Some of it might have been due to competition and it may have been due to other causes. On the other hand, all of it, or a part of it, may have been due to these alleged slanders. That is for you to determine.

Now I said there is three kinds of damages, nominal and/or actual, and thirdly is this matter of exemplary damages. Exemplary damages are damages where there has been actual damage suffered and where the jury finds that the slanderous statements were made, that they were not true, and that they were made maliciously. In that event, the jury is authorized, in its discretion, if it feels that the evidence calls for it, to award the plaintiffs such sums of money as will, in their judgment—sum or sums of money, as will, in their judgment, operate to penalize or punish the defendants for having uttered the slanders and to deter them from making similar utterances in the future. That is a matter in your own good sound judgment, if you decide to award exemplary damages by way of punishment or deterrent, so if you find that the alleged statements were made substantially as alleged, with actual malice or with gross indifference of the plaintiff's rights as to—such gross indifference of the plaintiff's rights as to amount to wilfulness or wantonness, then you will find for the plaintiff for exemplary damages.

Now so far as malice is concerned, of course a corporation could only be guilty of malice through its superior officers. In this case, the time—at the time of the utterance, the malice is attributed to the

man that uttered them, Harry Meyer, or allegedly uttered; so the question arises, "Is he a superior officer of the company?" He testified, as I recall, that he was the general manager, at one part of his testimony, and another time, he was not so sure of his title or his duties, his responsibilities, or his authority, so I am going to leave it to you as to whether he is a superior officer or not.

In the event that you find that the slanders were uttered as alleged and that they were maliciously uttered by him, if you find that he was general manager of the company, I think he was a—I charge you that, in that event, he was a superior officer of the company and so malice could be attributed to the corporation.

On the other hand, if he wasn't general manager he is not a superior officer, and it couldn't be attributable to the corporation for the purpose of awarding exemplary damages.

Now, for that reason, I have worded a form of verdict which you may use or not use, as it may suit your convenience; first, in the event of a verdict for the plaintiffs, "We, the jury, find for the plaintiff, Roto-Lith, Limited, and against the defendants, for blank damages." I mean there the nominal or actual damages that you may see fit to award. Now the second section, "We further find for the plaintiffs and against the defendant Texas Plastics, Inc., and/or Fred J. Meyer, exemplary damages in the sum of blank dollars." If you determine that exemplary damages should be awarded, then you will determine whether or not they should be awarded solely against the man making the statement or against Texas Plastics or against both, and you can strike out "and/or" and strike out either one of those names, just what-

ever you find. I am just simply trying to assist you. The third form of verdict is in the event of a verdict for the defendants, "We, the jury, find for the defendants."

Now in this case, lady and gentlemen of the jury, I have asked some questions at times, broken in and asked questions of witnesses on both sides; in doing that, I assure you I had no idea or intention of trying to take sides on either side. I think I asked about as many on one side as I did the other, but I wanted to dispel the idea from your mind that by doing that, or by anything I may have said in the course of the trial, I was seeking to influence your verdict on the facts in any way.

You, lady and gentlemen, are the sole and exclusive judges of the facts and of the credibility of these witnesses, which ones you will believe and which ones you will disbelieve. You have a right to accept all of a witness' testimony or reject all of it. You have a right to accept some of it and reject the remainder of it, as you may feel the evidence justifies.

It gets down, it seems to me, in the final analysis, in determining which witnesses you are going to believe and which witnesses you are going to disbelieve.

Now I have this suggestion to make to you. The first issue in the case was did Meyer make these statements substantially as alleged by the plaintiffs to the people that they say he made them to? You heard Mr. Boler, you heard Mr. Blackwell, and you heard other witnesses in the case. You have heard Mr. Meyer. He either made the statements or he didn't make them. He is either telling the truth or somebody else is not telling the truth. It is for you to determine who speaks the truth. Was the reasonable intendment and the meaning of the words that

he used intended to charge that—or to say that the plaintiffs would cheat and defraud their customers by short weights and other methods, and was it calculated to seriously injure—injuriously affect the reputations of the plaintiffs as to honesty and integrity and fair dealing? Hs says he didn't mean any such thing. What do all the facts and circumstances in the case, including his own testimony, indicate? Were the statements true? Well, the plaintiffs say he said one thing, their witnesses say he said one thing, he says he said another; he says, "I just simply told them we had had trouble about it and we had had to file a complaint and that we had had—" I have forgotten the details and I don't care to discuss it in detail. Of course certain parts of it could have been true, that is that they may have received what he has denominated as a short count and which the plaintiff denominates otherwise, but now, as I recall, he testified that he was up there on two or three or four occasions in the plant of the plaintiff and he observed a counting machine that wasn't in good shape and that he observed that when some goods were thrown out, or a sack or bags were thrown out, that the counter wasn't run back. Could any shortage that occurred have been attributable to the machinery or must it be ascribed to some dishonest intention on the part of the plaintiffs to cheat and defraud their customers? We have evidence in the case that the defendants claimed an alleged shortage; the amount, the plaintiffs say, was small, at the most; the defendants say it was large. You have heard the testimony. Does that justify a charge, if it was a charge, that the plaintiffs were crooks and cheap chiselers and that they would defraud and cheat their customers?

Those are factors for you to consider, now, in determining who you believe and who you disbelieve, not as any limitation upon your right to consider all of the other evidence in the case; you should. Was he actuated by malice or did he act in good faith and believing his statements to be true? All of the circumstances in the case before you, you may consider that, of course, upon that question.

Now I told you that you were to determine which you believe and which you disbelieve, and you have a right to discard the testimony of any witness, in whole or in part.

Now in passing on the credibility of these witnesses, which you believe and which you disbelieve, how much you can accept of their testimony and how much you want to reject, you have a right to consider, among other things, the manner and demeanor in testifying on the witness stand; is it due to nervousness or is it due to something else; do people who control themselves upon the witness stand always tell the truth, or were they telling the truth, or people who cannot control themselves upon the witness stand, are they of such a type that if they believed somebody was a crook, they would hesitate to say it, before this lawsuit was filed? The manner and demeanor in testifying on the witness stand, both sides; the reasonableness or unreasonableness of the story they tell; their interest or want of interest in the outcome of the case. The plaintiff is asking for money damages. The defendant is trying to defeat—the defendants are trying to defeat money damages. Has that affected the testimony of them and their witnesses, on either side?

Any conflicting statements made in depositions or at other times and places from what they testify on

the witness stand, that may afford some light on how much weight you can attach to the testimony of a particular witness.

Now in this case, the burden of proof is on the plaintiffs to establish their case by what is called a preponderance of the evidence. Preponderance of the evidence does not mean beyond a reasonable doubt; it simply means the greater weight of the credible evidence. You have seen the pictures of the Goddess of Justice with the scales in her hands and they are evenly balanced. When the scales preponderate, or when they tip, they may be said to preponderate on one side or the other. Of course if they are evenly balanced, there is no preponderance.

Now preponderance of the evidence doesn't mean, necessarily, the side that has got the greater number of witnesses. One side might have one witness to certain facts and the others have a number of witnesses, and yet the testimony of the one might be more believable and credible in the mind of a juror than the testimony of several.

Now as I say, the plaintiff has the burden on proving the case as a whole, but once a slanderous statement is shown to have been made, uttered, as I told you, the—it becomes slanderous per se, and if a defense is made that the statement was true, then the burden of proof is on the defendants, the man or the person making a slanderous statement, as I have defined that term to you, that is a statement the meaning of which is calculated to injuriously affect people in their reputation for honesty, integrity and fair dealing, the meaning of which is to infer, as in this case, that the plaintiffs would cheat and defraud their customers by short weights or by other methods; I say, if statements of that type are proved, by a pre-

ponderance of the evidence, to have been made, then it becomes the burden of the party asserting that they are true to establish, by a preponderance of the evidence, that those statements are true.

All right, gentlemen. You may approach the bench.

(Whereupon the following proceedings were had at the Court's bench, out of hearing of the jury.)

The Court:

Let the record show that, prior to the Court's charge, counsel on both sides tendered their equested instructions, which have been filed with the Clerk and the action of the Court noted thereon; that the Court stated that counsel on both sides might have an exception to the Court's charge now for failure to charge the jury in the terms of the requested charges and that you have your exception.

I just wanted to eliminate that on both sides, make the record clear.

Counsel for the plaintiff, any exceptions to the Court's charge, in addition?

Mr. York:

We except to the submission of the question of privilege to the jury as to the witness Edd Boler.

We further object to the Court's instruction to the jury that the making of the statements to the salesmen Blackwell and Leverman were privileged as a matter of law.

The defendant—plaintiffs further object to —

The Court:

You take the position that both of them were not privileged, neither of them were privileged.

Mr. York:
Yes, sir.

The Court:
All right.

Mr. York:
The plaintiffs further object to the instruction of the Court that the jury may award nominal damages in this case.
That's all.

The Court:
All right, defense.

Mr. Wagner:
The defendants object to the charge on the ground that the Court has supplied the innuendo that should have been pleaded.
Two, that the Court has instructed the jury that actual damages may be awarded, when there is no proof to sustain an award of actual damages.
Three, that the Court has instructed the jury that they may award damages for loss of profits, when there is no evidence showing a loss of profits proximately resulting from the slander complained of and of which there is any evidence.
That the Court has charged the jury that Boler and "perhaps another customer whose name I do not recall," when there is no evidence to sustain anything about any other customer than Boler.
The Court has erroneously charged the jury that they may find that Fred Meyer is a "superior officer" of Texas Plastics, when there is no evidence to support such a finding.

The Court has erroneously instructed the jury that they have to decide whether "Meyer or somebody else is telling the truth" with reference to the slanderous statements, whereas it is not necessary that the jury find that either Meyer or "someone else" is lying; the issue is not that clear-cut, under the evidence in the case.

The Court has erroneously led the jury to believe that there were conflicting statements in the deposition or on other occasions, which could refer to nothing except the deposition of Meyer, since it is the only deposition in the case and there were no "conflicting statements" in the deposition.

The Court has erroneously instructed the jury that the burden of proof is on the defendant to prove the truth of the statements, even though they were made on a privileged occasion.

The Court:
Oh, no, I didn't do that.

Mr. Wagner:
Yes, you did.

The Court:
On your defense of truth, I said—

Mr. Wagner:
Well, but you made it so all-inclusive, Judge, that the burden is completely on us, whereas I think the law is otherwise.

The Court:
All right.

(Whereupon the following proceedings were had in open Court, within the hearing of the jury.)

The Court:

Now, lady and gentlemen, during the course of the trial, I withdrew some evidence from you, or instructed you not to consider certain evidence. I repeat those instructions, and I particularly instructed you that there could be no recovery based on the plaintiffs' claim of an asserted slander uttered to Mr. Lutz, because Mr. Lutz failed to testify, in substance, to the slanders alleged by the plaintiff—plaintiffs. I repeat those instructions now.

Now after having instructed you as to the law a while ago, I stated that in considering the testimony of the witnesses on certain issues, that—for instance, I said the issue of whether or not these statements were uttered; Mr. Meyer said he didn't make the statements, Mr. Boler said he did, other witnesses who may have testified, Blackwell or others; it is a question for you to determine as to whether—or which was telling the truth. I merely gave that as illustrative of the instruction that I gave you that you have a right to reject, in whole or in part, the testimony of any witness, on any point, and not that that is necessarily the decisive issue in the case, but simply as illustrative.

Now if, during the course of the trial, I have said anything with reference to the facts, or by the inflection of my voice, that has led you to believe that I have an opinion one way or the other, I assue you I had no intention of doing so, and I am not attempting to influence you as to your decision on the facts, or on the lawsuit as a whole. That is your responsibility and not mine.

Anything else, gentlemen?

Mr. Wagner:
That's all.

The Court:
All right. Now, Mr. Porter, I am going to appoint you as foreman and you can take with you to the jury room the exhibits; if you want these boxes in there, I suppose we can have them brought in, whatever has been introduced in evidence. I am going to let you use the library room, my old library room. I believe it is air conditioned. I hope the air conditioning is working all right ths afternoon. Have you checked that, Mr. Marshal?

The Marshal:
It s not quite as cool as it should be in there, but it is—

The Court:
All right, I hope it will be more comfortable there, and if it isn't, why, let me know and we will get out of this Court room and bring you back in here.

All right, you all may retire quietly. Thank you.

Let me say this to you, if you decide, after a while,—you should want to go out for coffee, just leave everything in the jury room and lock it and go on out, and while you are out, don't discuss, don't let anybody discuss it in your presence, and come back in the jury room. All your talk must be about—about this case, must be in the jury room, when all twelve of you are present. Thank you.—

(Whereupon, at 2:17 p.m., May 25, 1956, the jury retired and Court was recessed.)

At 2:25 p.m., a discussion was held between the Court and counsel, off the record, after which the reporter was called and instructed by the Court, in the presence of all counsel, to let the record show that it was stipulated that Judge Allred could personally go into the jury room and inform the jury that only the two boxes presently in the jury room had been offered in evidence and therefore no other boxes could be furnished the jury for their examination in the jury room, after which Court was again recessed.

At 5:25 p.m., May 25, 1956, the following proceedings were had.)

The Court:
Gentlemen, I want to inquire, due to the lateness of the hour, about the prospect of a verdict.

Jury Foreman:
Your Honor, the chairman wishes to report a difference that still does not—

The Court:
I don't want you to tell me how you stand or anything of that sort.

Jury Foreman:
Yes, sir.

The Court:
It's what?

Jury Foreman:

Just wish to report a difference that still does not permit a decision at this time.

The Court:

Are you making progress?

Jury Foreman:

I think we are, sir.

The Court:

Well, I just wondered whether we—you wanted to work some more this evening or—if you think there is a possibility of a verdict this evening, I will just stay around.

Jury Foreman:

Am I allowed to submit that to the jury for a decision, sir? What is the opinion of the jury?

The Court:

Well, here is the situation, gentlemen. I have been gone from home all week and I kind of want—I want to go in home tonight, and I will not be back down here until Monday afternoon, so that if you recess over, it will have to be 'til Monday afternoon, and if you think that you can reach a verdict this evening, I will wait on you.

Jury Foreman:

We have got to take it from several angles, step by step.

The Court:

Yes, I understand. It has taken some time to try it and I am not trying to push you at all, and I

don't want to rush you at all. I just wanted to make some inquiry about it and—I tell you what you do, you all go on back, and if I don't hear from you, I will know that you feel that there is a possibility of bringing in a verdict this evening, and I will wait. You let me know if you want to be recessed over, you let me know later, by a note.

Jury Foreman:
We will go back, sir, and I will question the—

The Court:
Yes.

Jury Foreman:
—opinion of the jury.

The Court:
I think you should discuss it among yourselves and not in here in front of us.

All right, thank you very much. I appreciate the way you are working.

Court will stand at ease.

(Whereupon, at 5:28 p.m., May 25, 1956, the jury retired and Court was recessed.

At 6:50 p.m., May 25, 1956, the following proceedings were had.)

The Court:
All right, Mr. Foreman, do you have some report to make?

Jury Foreman:

Your Honor, I wish to report there has been no decision reached and a vote taken by the jury has indicated it will take considerable time to do so.

They have—also we voted and agreed that if you so desire, we will stay tonight and attempt to do so, or come back later.

The Court:

Well, I will be very glad to do so. In fact, I will prefer that, if you think you can reach a verdict tonight.

Jury Foreman:

There is indication, sir, it will take considerable time to do so.

The Court:

Well, that's all right. We will just stay with you up here.

I think we all ought to go out and eat something. We will feel better. Something else, sir?

Juror:

A gentleman of the jury requests that we ask for permission to use the Court room after we return.

The Court:

All right, I think that would be all right. We don't have anything in here, do we?

The Clerk:

No, sir, everything is okey.

The Court:

All right. I started to suggest that this afternoon, but—that will be fine. I tell you what you do, then, you leave the papers right here on the Clerk's desk, and, Mr. Marshal, will you—is the Marshal here?

The Marshal:

Yes, sir.

The Court:

Will you get the papers, please, and just leave them here on the Clerk's desk; give them to the Clerk. And what time can you all come back, now?

Jurors:

7:30.

The Court:

All right. Well, you just come on back in the Court room and, Mr. Marshal, keep everybody else out of the Court room, just let them come back in here and go to work when you get all twelve in here. Now don't work some of you in groups 'til the others get here. All of you work together, and do not discuss the case while you are out eating or let anybody discuss it in your presence.

All right, you may retire quietly.

(Whereupon, at 6:52 p.m., May 25, 1956, the jury retired from the Court room and the following proceedings were had.)

The Court:

Now get everything out of here in the way of evidence and bags and so forth that is not in evidence.

All right. Well, I will recess for thirty minutes or forty-five minutes, anyway.

(Whereupon, at 6:53 p.m., May 25, 1956, Court was recessed.

Commencing at 10:25 p.m., May 25, 1956, the following proceedings were had.)

The Court:
All right, Mr. Foreman.

Jury Foreman:
Your Honor, if it please the Court, we have used every means and manner we can think of at the minute to get together for a decision, but we have none to report at this time. It has been suggested that possibly a night's rest might influence the matter. We leave it in your hands.

The Court:
Well, now, pardon me; you may be seated. I can appreciate the fact that you all have worked hard and faithfully on this. So have we. So have the attorneys on both sides.

Now this case took us three and a half days in trial, pretty long days, lots of witnesses. I can understand you want to go home. I do too. I have been wanting to go since early in the afternoon. I canceled out some engagements—some settings in Corpus Christi for this afternoon in order to remain over tonight.

This trial has been an expensive trial to the parties. You can see that. Some of them come here from a distance, on both sides.

I want to say this to you, lady and gentlemen: You are representative of the four counties from whence you come here. You are representative of the citizenship, the intelligent citizenship, of these four counties. You have had an opportunity to hear all of the evidence in the case. I know you have studied it and are studying it carefully and conscientiously.

I don't know what your difficulty is, but I will say this, that no juror or set of jurors, group of jurors, should have their minds so set that they would be unwilling to review and reevaluate and reconsider and freely exchange views with an idea of deciding this case if it is possible to do so.

I have no reason to beleve that any other jury of twelve men and women of this area could settle this —could decide this case any more intelligently than you.

Frankly, I see no real reason for any unequivocal stand on the part of any juror, under the evidence in this case. I don't mean that any juror should sacrifice his or her honest convictions, but I do suggest that you all reconsider and reevaluate and—with a willingness to be convinced and—if it can be done consistent with your oaths, and see if you can't arrive at a verdict.

I am going to ask you—and I don't want to impose on you, but I am going to ask you to work a little longer on this case, and, if necessary, I am willing to stay over as long as it takes. That is, I guess, what I hired out for. I have worked very hard, as I told you before, on this case, I was in my office

day before yesterday morning at 6:00 o'clock and—or maybe it was yesterday morning, I have forgotten, and this morning at 7:00, to try to present this—the instructions to you as intelligently and as clearly as I could. It would have taken me a half a day longer before it ever reached you if I had reduced my instructions to writing. That is the reason I tried to do it orally.

So since I have stayed over and the parties having gone to the trouble and expense that they have in the trial of this case, I am going to ask you to work a little longer, lady and gentlemen. See if you can't reach a verdict.

Juror:
Your Honor, do we have the right to ask questions in open Court?

The Court:
Yes, sir.

Juror:
Could we ask them now?

The Court:
Yes, sir.

Juror:
Would you give us part of your charge, the three points that we was to decide on, again?

The Court:
Well, I don't believe I—I don't know whether I summarized it down to three points or not.

Juror:

I thought you did, in your original charge. If a man—what I was getting at, if it was what the man said, if he said it honestly and in the proper place, could you give us that little bit again?

The Court:

That was the question of privilege as to the statements made. I would have to get my notes, I expect, to do that. I took them in there and put them on my desk when you all were going to use the Court room. Now is that what you had in mind, the privilege question?

Juror:

I thought you told us we had three points to decide.

Juror:

Yes, sir, the privilege question.

Juror:

Would we be permitted to say that the jury, I think, has made a wonderful stride forward in arriving at a decision?

The Court:

The only reason I—thank you. I think you have worked hard and faithfully and I don't want to impose on you and the only reason that I hesitate about reviewing a part of the charge is this, it might emphasize it more than some other portion of the charge, and the question of privilege is quite detailed. I expect I occupied more time on that than any other portion of the charge. I will repeat if if you all want me to. I will have to get my notes.

Juror:

Might I say a word there? If we would get together and definitely determine the points of disagreement there, it seems to be a lack of—rather a difference in opinion on some facts that were stated, on the basis of memory, whether or not—one seems to remember it one way and another seems to remember it another.

The Court:

Well, maybe if you would ask me what those points are, we might be able to clarify them here. In many instances, as I recall, the testimony is diametrically opposed between these two opposing parties.

Juror:

It is not the testimony, Your Honor, it is the charge that we were not so sure of.

The Court:

Well, you will have to let me know just exactly what you want, now, and I will try my best to intelligently—

Juror:

The last four points you gave, sir.

The Court:

The last four points?

Juror:

Well, the last points you gave in regard to the charges made by the plaintiff.

The Court:

Well, the last portion I gave, I believe, was with reference to exemplary damages, except I did tell you about your right to accept or reject the testimony of any witness, in whole or in part.

The last portion I gave you was along the question of exemplary damages, so I don't know—I don't know just what part of it is that—what part it is that you are asking me about.

Maybe if we retired and let you all work a little longer, you can get your question framed a little better, just what you want, just what you have in mind, by way of instructions. Mr. Foreman?

Jury Foreman:

Might we get together and frame our questions and come back for clearance on some things? I mean would that be in order?

The Court:

Yes, sir; I think it ought to be all of you and not just one individual juror, that you ought to—

Jury Foreman:

I believe we are going to have to do that, go and frame our questions and try to clear up everything and write it down and then come back. Are we allowed to write it down—

The Court:

Yes, sir.

Jury Foreman:

—and come back and specifically ask the Court to clear those questions up?

The Court:
Yes, sir.

Jury Foreman:
Thank you.

The Court:
All right, thank you very much.

(Whereupon, at 10:35 p.m., May 25, 1956, the jury retired and Court was recessed.

Commencing at 12:23 a.m., May 26, 1956, the following proceedings were had.)

The Court:
All right, Mr. Foreman.

Jury Foreman:
Your Honor, we still report no decision. We have been unable to even specifically list questions to be brought to the Court by which we could arrive at a decision. We have decided to come back to you for further consultation, to see if you can make any suggestion as to how we could arrive at a decision. We even tried to specifically list the questions to bring back to the Court and couldn't agree on that.

The Court:
Well, maybe we are all tired out. We had better take a rest over night.

Juror:
Suits me.

Jury Foreman:

Might I suggest you appoint a new chairman? Maybe he could do better.

The Court:

No, I don't believe so. I heard of a jury one time that—the Judge usually, you know, leaves it to the jury to select a foreman, and I heard of a jury that got hung up one time on not being able to select a foreman, so I have been adopting the rule of appointing a foreman.

Well, I'll tell you, now, let's forget about it tonight; go home and get a good night's sleep and just forget about this case.

Sometimes I get hung up, when I try a case myself, without a jury, I get hung up with myself, and I find the best rule is to forget about it 'til morning, I can think better in the morning. So I am going to suggest that you do that.

We will recess—I'm sorry to have kept you so long. I hope I haven't been punishing you too much, but as I said, we have worked awfully hard too, and—is 9:00 o'clock too early?

Jurors:

No, sir.

The Court:

Or 9:30, which would you prefer?

Jurors:

9:00.

Juror:

9:00 is all right.

The Court:
Sir?

Juror:
9:00 is all right with me.

Juror:
That is tomorrow?

The Court:
Is that all right with the lady?

Juror:
Yes, sir.

The Court:
All right. Now you all forget about it over night. Come back at 9:00 o'clock in the morning and we will see what we can do. You may retire quietly. Don't discuss it in the meantime, and don't let anybody discuss it. Just leave the papers with the Clerk, Mr. Foreman.
Good night to all of you.

(Whereupon the jury retired from the Court room and the following proceedings were had.)

The Court:
Well, I have been violating my union shop rules too, I am an eight hour a day man, as most of you have noticed; I have been down here when lots of you weren't here.
All right, we will recess.

(Whereupon, at 12:36 a.m., May 26, 1956, Court was recessed.

Commencing at 9:00 a.m., May 26, 1956, the following proceedings were had.)

The Court:

Now, lady and gentlemen, I have been up pretty early myself this morning. I have been giving this matter considerable thought.

I do not wish in any wise to change the charge that I gave you with reference to the law, the principles of law applicable to this case, but in all jury cases, the Judge has a right to tell the jury what he thinks about the facts, what he thinks about the credibility of the witnesses, and why, or some of the witnesses, and why, provided he carefully admonishes the jury, which I shall do at this time and again at the close of this additional instruction, that you are not bound to accept, unless it agrees with your own good sound judgment, as—on your oaths as jurors, your own good reasoning.

I said that I have the right to do that; I seldom do it.

The Appellate Courts have said that it is the duty of the Judge to comment on the evidence and the credibility of the witnesses, provided he gives you the instruction that I give you, and provided, of course, that he is not partisan about the matter and doesn't ignore the theory or the contentions of the other party.

Now there has been only one aspect of the case that I desire to repeat and state some general principles that—and give you examples of what I mean

and tell you to apply these tests to every witness in the case, witnesses for the plaintiff and witnesses for the defendant.

You will remember that I told you yesterday that you are the sole judges of which witnesses you believe and which witnesses you disbelieve, whether you shall accept a witness' statement in whole or in part. I told you that you were free to consider, among other things,—not limiting you to these things, they are just some of the general rules, that I think juries instinctively take into consideration in determining credibility of witnesses; perhaps they can't express them in these terms—interest or want of interest in the outcome of the case; manner and demeanor in testifying; reasonableness or unreasonableness of the story; their opportunity for knowing the facts about which they are testifying; any conflicting statements they may have made and whether or not any conflicting statements have been satisfactorily explained.

Now let me illustrate what I mean by interest or want of interest in the outcome of the case. You have, on one side in this case, Mr. Borak, the plaintiff, and his Borak Company. He is claiming that his good name has been defamed, his business reputation, in the respects that I mentioned, honesty, integrity, fair dealing, and asking the jury to find that he has. He is asking for damages. He is an interested witness. Interest or want of interest. Now does this fact, in applying the test to Mr. Borak—does the fact that he wants to recover damages influence his testimony? Has that caused him to testify falsely before this jury?

On the other hand, we have Mr. Meyer, one of the defendants in the case. He is being sued for damages. Has that fact caused him to testify falsely?

Mr. Borak says that he admitted to him that he had made the statement that Borak and his company were crooks and cheap chiselers and said he would straighten it out.

Meyer denies that.

Which one has the greater interest in the outcome of the case?

That is just one of the tests.

Now I am not confining you to these tests. I am giving you illustrations.

The same test should be applied to other witnesses, all witnesses in the case. And I am giving this merely by way of illustration.

Sometimes when we can say maybe that both sides are equally interested, or both sets of witnesses, one set of witnesses against another, perhaps a jury might find light in the testimony of disinterested witnesses.

In this case, as I recall it,—and if I misstate the evidence in any respect, you rely on your own good sound judgment—Mr. Edd Boler testified, in substance, that Meyer had told him that the plaintiffs were crooks and cheap chiselers, and in the background and the connection in which it was made. Meyer denies that he told Boler that.

What is Boler's interest in the case?

What has he to gain, or has he profited by testifying falsely to that effect? Is he mistaken?

Did Meyer testify falsely about what Boler says he told him? Is he mistaken about what he told Boler?

Who is interested in the outcome of the case sufficiently that it would affect or influence his testimony?

Mr. Blackwell, if I remember, testified, in substance, that Mr. Meyer had made similar statements to him, and in the presence of other salesmen, and one of the others testified that he didn't remember all that Mr. Blackwell says Mr. Meyer told him.

What is Blackwell's interest in this case? Is he so interested or influenced that he would come in here and testify falsely, to practically the same thing that Boler has testified?

I believe there is some intimation in the case that Blackwell had an argument with Meyer, and therefore it might have influenced his testimony. Might not the same argument have influenced the testimony of Mr. Meyer?

Interest or want of interest in the outcome of the case.

You may apply, and should apply, that test, and ask yourselves those questions, about other witnesses in the case, all the other witnesses for the defendant, all the witnesses for the plaintiff.

I am trying to assist you gentlemen, without—and lady, without intruding upon you, in analyzing this evidence and arriving at the truth of this matter.

I have a right to do this and I feel it is my duty to do it, especially where a case has been as long and laboriously tried at this was.

Mr. Boler impressed me as a fair minded young man who was trying to tell the truth. I heard nothing brought out on him that led me to believe that he was falsifying or fudging.

Now you are not bound to accept that opinion of mine unless it agrees with your own, upon a calm and careful and candid consideration of the evidence.

Mr. Blackwell impressed me as being that type of witness.

The manner and demeanor in testifying on the witness stand. What witness twisted and turned and what witness didn't remember whether he said certain things and denied that he said certain things until confronted with documents that he was about to be read from or something of that sort, said, "Oh, yes, I believe I did say this, or that." Manner and demeanor in testifying on the witness stand.

Was there anything about Boler's manner, his demeanor, on the witness stand, that indicated that he was fudging or not telling the truth?

Was there anything about the countenance or the manner in testifying of Mr. Blackwell that indicated that he was fudging and not telling the truth?

Now the reasonableness or unreasonableness of the story. As I recall the evidence, there had been an argument back in 1944 about some alleged shortages and there had been a lawsuit against Mr. Meyer's superior officer, we will say, for great damages, for an instance in New York; that all was settled. The defendant plastics company had been set up down here as a competitor of the plaintiff. Mr. Meyer had been manager of the plant. What motive could have actuated him in making the statements that he is alleged to have made and that Boler testified about and Blackwell testified about, if he did make them?

Now you apply these same tests to other witnesses, and as I tell you, you are not bound to accept them, but I make this suggestion to you, in determining whom you will believe and what you will believe and what you will discard and what you will accept; if Mr. Meyer made the statement—which is apparently a pretty hotly contested issue in the case, the very first issue, perhaps—if he made this statement substantially as alleged, to Boler and to Blackwell, the

plaintiffs were chiselers—cheap chiselers and crooks, and, in the background, the light in which it was said, it meant that they—in connection with other things that he said, if he did, it meant that they would cheat and defraud their customers; if he made that statement, then he has either testified falsely, or been mistaken, or Boler and Blackwell have testified falsely and been mistaken, one or the other.

Now if Meyer has testified falsely, or mistaken, about that matter, could it be that he has testified falsely or was mistaken about other vital issues in the case, such as the issue of good faith and believing the statements to be true, under this qualified privilege principle that I discussed with you or charged you about yesterday?

In order to be qualifiedly privileged, a statement must not have only been made at a proper time and a proper place and a proper setting, but it must have been made in good faith; it must have been believed to be true at the time that it was made.

If a witness didn't say—or if Meyer didn't say—in substance, that plaintiffs were crooks and cheap chiselers, of course there is no occasion for discussing whether he believed that to be true, but if he did say it—and he says he didn't—then could he have believe it to be true? Is he entitled to a finding that "Yes, he did say it, although he denies it under oath, and yet he believed it to be true"?

Now these are some illustrations that I am giving you, not to single them out over any other witnesses in the case.

You apply, and may apply, the same test, or any other test that, in your good sound judgment, affects the credibility of these witnesses, as to who is telling the truth and who isn't telling the truth.

Was the statement true, if he made the statement, that the plaintiffs were crooks and cheap chiselers and—under all the circumstances and in the background and in the light of all that was said, he meant by those statements that the plaintiffs would cheat and defraud their customers by short count or other means; was it true? Where is the evidence that it was true? There are circumstances in the case that have been discussed by counsel and I would not limit you to my recollection of all of the circumstances. Circumstances relied upon by counsel are that checks were made, one by—upon the complaint of the defendant, by the Bureau of—in New York; that there was a shortage in count in some of the boxes that, I believe, had been picked up by some employee or some truck driver hired by Mr. Vahlsing, Jr.; that Mr. Meyer himself had—perhaps the other bookkeeper, or bookkeeper had found some accounts short down here, and there is a great dispute between the parties as to—and seems to have been at the time of and immediately preceding the settlement, as to whether or not the shortage was substantial or not or was within the limits of tolerance. Does that alone, or taken in connection with other circumstances in the case, show that the slanderous statements were true, if Meyer made them? What other evidence is there in the case that it might have been true, if it was made? Well, we have the testimony in here about some shipments to Mr. Lutz, long after the time of the alleged shortage in this case, and we are not trying out a shortage case, this is not a suit for damages between them on account of the shortage; but Mr. Lutz received some shipments, and, as I understand, recall, this was long afterward, after the statements

were made, even, and some checks were then made on those under circumstances that are before you here, after they had been in storage for a long time, in containers that you are to decide whether or not somebody could have slipped out some of the bags or not.

I let that in as a circumstances in the case, on the question of whether or not these charges, if they were made by Mr. Meyer, were true.

If shortages existed both in the shipments to the defendant in the case, or the defendants, and in the shipment to Lutz, were they substantial enough to indicate that it was intentionally cheating and defrauding customers, or that plaintiffs would do that, or could the shortages, if they existed, couldn't they have been due to machinery difficulties, to carelessness on the part of help, of which the plaintiff didn't have any knowledge; could they have been due to some of these bags having maybe been slipped out and selected—or selected cartons—the counts made in selected cartons? Those are all factors for you to consider.

Now as I told you, you review all the evidence, consider all the witnesses, apply these tests, if you see fit to do so, the tests of interest or want of interest, reasonableness of his story, manner and demeanor in testifying, any other factor that may, in your judgment, affect the testimony of any witness in the case.

I think when you do that, lady and gentlemen of the jury, that you should be able to arrive at the truth of this matter.

And again I tell you that what I have said as to my impression of these witnesses, or my summary of this evidence, or any indicaton of opinion on the

merits of the case, or whether one witness was telling the truth and another one wasn't, that is not binding on you unless it appeals to your own good sound judgment, and your own oath can be satisfied, to render a just verdict in this case, so you feel free to reject it, if it hasn't been of any help or assistance to you, and if it doesn't appear sound to you. I don't want to impose my views in any way upon this jury. I am simply trying to assist you, if I can, in arriving at a just verdict.

The evidence is so voluminous, so many witnesses have testified, that I cannot review all of it with you. I can only give you these general principles and some illustrations of how to apply these tests, perhaps; tell you to apply all these principles and any others—these tests and any others that you may see fit to apply, to all witnesses in the case, to all issues in the case.

Of course there is disagreement among the witnesses on a lot of points. Some of them might not be decisive of the case, but they might be indicative of whether witnesses were telling the truth or—if they weren't telling the truth on that particular point, whether they were telling the truth on other points or not.

All right, I will see counsel in chambers, and you, lady and gentlemen, may resume consideration of your verdict.

Yes, sir?

Juror:

There has been some question about the total amount, with regard to dollars and cents, that the plaintiff seeks to recover, and the specific charges under which each amount is made.

The Court:

Well, I don't think that is material. It isn't how much they are asking, it is how much do you want to give, how much does the jury want to give on the whole—based on the evidence in the case. It isn't—plaintiffs always ask for—or generally ask for large sums of money. They can't get any more than they have asked for. How much is your total prayer, counsel?

Mr. Abbott:

$400,000.00.

The Court:

Now that is—they just couldn't, in any event, recover more than that, and I am going to say to you that I don't think any—in this case, that—in my opinion, and you are not bound by it, but if you render a verdict for damages at all, I don't think it should be in any excessive sums or amounts; I would think that, on the whole, that total is much more than should be awarded in this case. That is a matter for you to decide. You just couldn't award any more than they ask, and whatever, according to the standards that I gave you here yesterday, whatever you see fit to award is what controls, not what the people ask.

All right, I will see counsel in chambers. You all may resume consideration of your verdict. I will just leave you in here. It is cooler.

Yes, sir? Another question, Mr. Juror?

Juror:

Yes, when you speak of the maximum asked for, $200,000.00, as set forth, now how does that work, does it double? I am talking about the figure that is

set out there—has been some remark made that any figure set down would be multiplied by two and I am not—

The Court:

No, no. No, no. That is some—under—no, under certain statutes, that have nothing to do with libel or slander, such as fraud in the sale of lands and so on there, is a statute that—

Juror:

In other words, a figure—

The Court:

Whatever you award is what the verdict of the jury will be, and don't take into consideration attorneys' fees and things of that kind, don't discuss things that are not in evidence; what you are to determine is whether the damages should be nominal, or whether—how much actual damage, if any,—if you get that far—how much the actual damages should be,—have been reasonably—in all reasonable probability will be, and if you wish to award punitive damages, how much you think should be awarded.

That is only in the event you settle these primary issues first, of liability.

And now there is nothing about double damages or triple damages. That is in anti-trust suits. You have heard of statutes on anti-trust, see. That's what I think you probably had in mind.

Juror:

Your Honor, that isn't what I had in mind. The suit is for $125.00 on one count and seventy-five on another. That totals $200.00.

The Court:
Two hundred thousand, you mean?

Juror:
Two hundred thousand, yes, sir. And that is where he arrives at that double for four hundred thousand.

The Court:
Uh huh. Well, if you all are considering that somebody might—if you bring in a verdict and I might double it or something, there in nothing like that in this type of case, and—

Juror:
Your Honor, another question of law. I don't know if it is in order to ask such a question. It seems to be bothering the situation. And that is it has been stated that whatever verdict we give, the case will most likely be appealed; seems to be influencing the matter.

The Court:
Don't consider that, whether it is to be appealed or what.

Juror:
Well, are we allowed to know if it could be?

The Court:
Well, I am not even going to tell you that, because it is improper for you to even consider it or take it into consideration.

Just you do your duty and the rest of us will do ours, and don't permit any discussion about appeals or what. That has nothing to do with it.

Juror:

Can you give us the approximate date that these charges are supposed to have been made?

The Court:

I believe in—let me see. Do you have the papers there, Mr. Clerk? Let's see. February of 1954—of 1955, wasn't it?

Mr. Abbott:

I believe that is as to some of the statements. The others were in January.

The Court:

January and February of '55, as I recall. I think that is approximately correct.

All right.

Now don't consider anything except what is in evidence, ladies and gentlemen. Don't discuss anything or take into consideration anything except the evidence you have heard.

All right. Just a moment, gentlemen.

Juror:

When was this suit filed?

The Court:

March.

Juror:

Of '55?

The Court:

Of '55. March—that's when—I know it was in March 1955. The exact date, I don't remember. All right.

(Whereupon the jury retired to continue their deliberations and the following proceedings were had in the Court's chambers, outside the hearing of the jury.)

Mr. Wagner:

The defendants in the case object and except to the Court's purported analysis or comments on the evidence on the grounds that they were unfair and constituted a speech for the plaintiff, totally ignoring all of the evidence favorable to the defendant.

As an example, the only conflict that the Court mentioned was that "What witness was it, while he was on the stand, had said one thing, and when about to be confronted with certain documents, changed his story, saying, 'Yes, I believe I did say that' "?

Th only instance in the record that I can think of that the Court had in mind was Mr. Vahlsing's testimony with reference to whether he called Mr. Borak or Mr. Borak called Mr. Vahlsing and it is doubtful whether that matter was even a material enough matter about which to impeach a witness, and yet the Court has singled out that one apparent conflict or change of story and ignored others where Mr. Borak has been impeached and contradicted by other witnesses; particularly comes to mind the matter of whether Mr. Borak was present while boxes of his were counted in Mathis, Texas.

The entire charge of the Court is excepted to for the same reason we excepted to his charge yesterday, that the Court is supplying the innuendo for the plaintiff.

The Court's charge, I am sure inadvertently, misstated the evidence about the Bureau's tests; the Court's explanation just given to the jury on that

point held the evidence up to the jury as very weak; that Mr. Vahlsing, Jr., hired the truck to move the boxes, therefore leaving the impression or feeling that, "Well, after all, Mr. Vahlsing, Jr., had these boxes and maybe they were tampered with before they got to the Bureau," whereas, in truth and in fact, the undisputed evidence not only from Meyer, who is an interested witness, admittedly, but from a disinterested witness, to-wit, Mr. Dolan, the Inspector of the Bureau, was that Mr. Dolan went with Mr. Meyer to the Roto-Lith plant, watched the boxes coming out of the plant, being placed on the truck, then followed the truck in his official government car down to the Bureau of Weights and Measures, where the boxes were unloaded in Mr. Dolan's presence, weighed on official scales, and then the test was made.

The Court has ignored, as I state, much, if not all, of the defendants' evidence. For example, he made no reference to what the defendant considers to be a very material piece of evidence, and that has to do with the testimony of Tom Blackwell, about the inventory shortages, and when they first showed up; that up until the time they did business with Roto-Lith, the whole year of '53, they only had an inventory shortage of nineteen dollars and some cents, and when they started doing volume business with Roto-Lith, the inventory shortages jumped from month to month so that by the end of the fiscal year 1953-54, to-wit on June 30, 1954, they had an accumulated inventory shortage of $5,700.00; that during the year —the fiscal year 54-55, at the end of that year, again they had an inventory shortage of $2,500.00, but that the big item going to make up the inventory shortage was eighteen hundred and some odd dollars loss in

corn bags, and that Vahlsing never bought a corn bag from anyone except Roto-Lith.

Well, I won't go on and make my speech to the jury again, but in general, that is my objection to the Court's comment on the evidence, and I further want to move the Court to instruct the jury, as they requested yesterday afternoon, that they were confused as to the Court's instructions on qualified privilege, and it is obvious that the jury, in a long charge —I thnk the Court charged the jury approximately an hour—could not retain the elements of what constitutes a qualified privilege and the Court should comply with the jury's request to go over the law as to qualified privilege with the jury.

The Court:

All right, no comment. I think my charge speaks for itself. The instructions were to apply the same tests and any other tests the jury saw fit, to each witness and all witnessess, on both sides, and I wasn't confining them to my recollection, to rely on their own.

All right.

(Discussion off the record.)

Mr. York:

We want to be sure that the record is clear that it is plaintiffs' position that the—that no privilege exists, as a matter of law, as to the conversaton between Meyer, general manager of the defendant Texas Plastics, Inc., and the witness Edd Boler, who was the customer of both plaintiff and defendant, and—

The Court:

You already have your exception, anyway.

Mr. York:
Yes, sir. We just wanted to be sure it was clear. That's all.

(Discussion off the record, after which Court recessed at 9:45 a.m.

Commencing at 10:55 a.m., May 26, 1956, the following proceedings were had.)

The Court:
Have you arrived at a verdict, Mr. Foreman?

Jury Foreman:
Yes, sir, we have.

The Court:
All right, will you deliver the verdict to the Marshal, and the exhibits? The Marshal will deliver them to the Clerk.

The Clerk:
(Reading verdict of jury.)

The Court:
So say you all, gentlemen—lady and gentlemen?

Jurors:
Yes, sir. Yes, sir.

The Court:
Is that a unanimous verdict?

Juror:
Yes, sir.

The Court:

I want to thank you. I think it is a very intelligent verdict.

Apparently, I had the idea you all were—from the questions you asked last night, that you were hung up on the issue of liability, but this morning, it seemed more directed to the question of the amount of damages.

Now I want to thank you for your faithful service here. You all have worked long and hard, not only in this case, but some of you have been on other cases. I appreciate it very much. I am sorry to have kept you working so long and hard. I have got a rather full program myself, is one reason I have to do this.

I have got to try another case Monday, and I am not asking you to come back, I am going to let you all off; I have ordered some more jurors—another case in which there was a hung jury, a criminal case, and a boy is in jail, I want to give him a speedy trial, and then Wednesday I have to fly to New Orleans for a conference of the Judges of all the six states in this circuit. We have our annual conference, that is required to be held, by law. So I have had a pretty full three weeks of it down here already and going to have a full week next week.

Now I want to say this to you jurors: You have a right to discuss this matter with anybody you want to now, you are excused, if you want to. You are not required to do so. You don't have to tell what went on in the jury room or what reason one juror gave or what one juror said or anything of that sort. That is a matter for your own good sound judgment, whether you want to talk to anybody about it and discuss what went on in the jury room. You may

talk to people, if you want to, about it. You are excused from the rule in every respect.

Again I thank you. You will not be called again, I don't believe, for another year. If you should be drawn and ordered to report within twelve months, you write me a letter, or any of the judges, and you will be excused by mail, on the ground that you cannot serve more often than once every twelve months.

Your checks will be mailed to you, I assume, will they, Mr. Clerk,—

The Clerk:

Yes, sir.

The Court:

—for your services, those of you who have not been paid, and I imagine none of you have been paid for this week, at least.

The Clerk:

No, sir, they haven't been paid.

The Court:

It has been a real pleasure to work with this group of jurors, although we have had such long hours and had to work—by the way,—you needn't put this in the record, it has nothing to do with—I got over here this morning pretty early and about 8:15 I decided there wasn't going to be any air conditioning unless I got after somebody. I had to request that it be turned on. These employees don't work on Saturday and I don't know whether they are paid for it on Saturday or not; they are not paid for overtime, such as we put in last night. Neither are we. We have all been putting in some overtime. We are not paid for it.

All right, thank you. You all may retire quietly and you are excused. Thank you very much.

You let that wait, Mister. Just wait. Just wait on that. Let the jury retire, and sit down, Mister.

(Whereupon the jury retired from the Courtroom and the following proceedings were had.)

The Court:

Now, counsel for the plaintiff, you may tender a judgment reciting the verdict of the jury and mail it to me at Corpus Christi.

Mr. Abbott:

All right, sir.

The Court:

We have plowed some new ground in this case, as far as I am concerned, and perhaps some questions on which law ought to be made.

I have tried my best to try it without error, so I don't think I would be interested in any voluminous briefs on any point.

Of course, if counsel desires to make a motion for new trial, he may do so, that is his right, but I probably will enter the judgment fairly promptly, within the next few—well, within a week or so, anyway. Don't want to rush you about it, but I want to go ahead and enter the verdict—or the judgment, and make your motion and I will try to act on it promptly.

Thank you very much, gentlemen.

Court will stand recessed 'til Monday at 1:30.

(Whereupon, at 11:00 a.m., May 26, 1956, Court was recessed.)

MOTION FOR INSTRUCTED VERDICT OF FRED J. MEYER.

Filed May 23, 1956.

(Title Omitted.)

To said Honorable Court:

Comes Now the Defendant, Fred J. Meyer, after the Plaintiffs' have introduced all of their evidence and rested and before either Defendant has offered any evidence, and respectfully moves the Court to direct the jury to return a verdict herein in favor of this Defendant for the following reasons:

I.

The evidence herein considered in the light most favorable to Plaintiffs would not support a jury finding of statements slanderous per se but only statements which might be slanderous per quod, and there being no pleading of innuendo from the language used and no pleading, and especially no proof of special damage, the evidence is such that it would not support a verdict herein awarding damages to the Plaintiffs or either of them.

II.

The evidence herein viewed in the light most favorable to Plaintiffs shows that the statements com-

plained of were made by Fred Meyer on a privileged occasion, and there is no evidence which would support a jury finding of actual malice on the part of this Defendant.

Overruled by the Court.

Wherefore, Premises Considered, this Defendant respectfully moves the Court to instruct the jury herein to return a verdict in favor of this Defendant and against both the Plaintiffs; and in the alternative, to return a verdict herein in favor of this Defendant and aganst the Plaintiff Harry Borak; and in the further alternative, in favor of this Defendant and against the Plaintiff Roto-Lith, Ltd.

Respectfully submitted,

COX, WAGNER, ADAMS & WILSON,

By FRED B. WAGNER,

Attorneys for Defendant.

MOTION FOR INSTRUCTED VERDICT OF TEXAS PLASTICS, INC.

Filed May 23, 1956.

(Title Omitted.)

To said Honorable Court:

Comes Now the Defendant, Texas Plastics, Inc., after the Plaintiffs have introduced all of their evidence and rested and before either Defendant has offered any evidence, and respectfully moves the Court to direct the jury to return a verdict herein in favor of this Defendant for the following reasons:

I.

The evidence herein considered in the light most favorable to Plaintiffs would not support a jury finding of statements slanderous per se but only statements which might be slanderous per quod, and there being no pleading of innuendo from the language used and no pleading, and especially no proof of special damage, the evidence is such that it would not support a verdict herein awarding damages to the Plaintiffs or either of them.

II.

The evidence herein viewed in the light most favorable to Plaintiffs shows that the statements complained of were made by Fred Meyer on a privileged occasion, and there is no evidence which would support a jury finding of actual malice on the part of this Defendant.

Overruled by the Court.

Wherefore, Premises Considered, this Defendant respectfully moves the Court to instruct the jury herein to return a verdict in favor of this Defendant and against both the Plaintiffs; and in the alternative, to return a verdict herein in favor of this Defendant and against the Plaintiff Harry Borak; and in the further alternative, in favor of this Defendant and against the Plaintiff Roto-Lith, Ltd.

Respectfully submitted,
COX, WAGNER, ADAMS & WILSON,
By FRED B. WAGNER,
Attorneys for Defendant.

VERDICT OF THE JURY.

Filed May 26, 1956.

We, the jury, find for the plaintiff, Roto-Lith, Ltd., and against the defendants for $25,000.00 damages.

We further find for the plaintiffs and against the defendant, Texas Plastics, Inc. and/or Fred J. Meyer, exemplary damages in the sum of $50,000.00.

HUBERT K. PORTER,
Foreman.

or

We, the jury, find for the defendants.

.....,
Foreman.

MOTION FOR NEW TRIAL OF FRED J. MEYER.

Filed June 29, 1956.

(Title Omitted.)

To said Honorable Court:

Fred J. Meyer, Defendant, moves the Court for an Order setting aside the verdict and granting a new trial upon the following grounds:

I.

This movement adopts as his own each and all of the grounds as set out in the Motion for New Trial

filed herein by this movant's co-defendant, Texas Plastics, Inc., as fully as though said adopted grounds were repeated at length herein,—the sole exceptions being that this movant does not adopt Grounds Numbers Ten and Eleven in the said Motion for New Trial of Texas Plastics, Inc.

Respectfully Submitted,
FISCHER, WOOD, BURNEY & NESBITT,
1903 Driscoll Building,
Corpus Christi, Texas.
COX, WAGNER, ADAMS & WILSON,
By FRED B. WAGNER,
Of Counsel.
P. O. Box 963,
Brownsville, Texas.

MOTION FOR NEW TRIAL OF TEXAS PLASTICS, INC.

Filed June 29, 1956.

(Title Omitted.)

To said Honorable Court:

Texas Plastics, Inc., Defendant, moves the Court for an Order setting aside the verdict and granting a new trial upon the following grounds:

I.

The verdict of the jury herein finding for "The Plaintiffs" and against "Texas Plastics, Inc. and/or

Fred J. Meyer exemplary damages" is so indefinite and uncertain that it will not support a judgment.

II.

The verdict of the jury herein finding for "The Plaintiffs" and against "Texas Plastics, Inc., and/or Fred J. Meyer exemplary damages" fails to apportion the exemplary damages between the two plaintiffs and therefore will not support a judgment.

III.

The verdict of the jury herein finding for 'The Plaintiffs' and against "Texas Plastics, Inc., and/or Fred J. Meyer exemplary damages" is invalid and ambiguous because of the use of the term "and/or" which is meaningless and has been criticized repeatedly by legal authorities as rendering impossible of definite ascertainment the meaning of the sentence in which the term "and/or" is used.

IV.

The verdict of the jury herein finding for "The Plaintiffs" and against "Texas Plastics, Inc. and/or Fred J. Meyer exemplary damages" will not support a judgment herein because it is impossible to ascertain from the verdict of the jury how much of the exemplary damages they were awarding to plaintiff Harry Borak and since the jury found no actual damages in favor of Harry Borak the award of exemplary damages is unauthorized in law.

5.

The verdict of the jury finding for the Plaintiff Roto-Lith, Ltd. "and against the Defendants for Twenty-five Thousand Dollars ($25,000.00) damages" is such that it will not support the entry of a judgment herein since it does not specify how much of said award is assessed against the Defendant Meyer and how much against the Defendant Texas Plastics, Inc.

6.

The verdict of the jury finding Twenty-five Thousand Dollars ($25,000.00) actual damages in favor of the Plaintiff Roto-Lith, Ltd. is so grossly excessive under the evidence herein as to shock the conscience.

7.

The Court erred in assuming in his charge to the might award to Plaintiff Roto-Lith, Ltd. damages for loss of profits in the past for the reason that there is no substantial evidence that Roto-Lith, Ltd. lost any profits in the past as a natural and proximate result of the alleged slander.

8.

The Court erred in permitting counsel for Plaintiffs to argue to the jury that F. H. Vahlsing, Sr. was a very wealthy man. Such argument having plainly resulted in the grossly excessive damages of Twenty-five Thousand Dollars ($25,000.00) actual and Fifty Thousand Dollars ($50,000.00) exemplary.

9.

The verdict of the jury awarding Fifty Thousand Dollars ($50,000.00) exemplary damages is so grossly excessive as to shock the conscience.

10.

The Court erred in assuming in his charge to the jury that any utterances by Meyer were imputable to the Defendant Texas Plastics, Inc., and instructing them that the only issuse in this connection is in connection with exemplary damages where they would be required to find whether or not Meyer was "the General Manager of Texas Plastics, Inc."

11.

The Court erred in instructing the jury that if Meyer was "General Manager of the Company", meaning Texas Plastics, Inc., his malice would automatically be attributed to the corporation.

12.

The Court erred in instructing the jury that they would be authorized under the evidence to find that in making the utterances Meyer did so with actual malice, there being no evidence to support a finding of actual malice but at the very most only a suspicion or surmise of actual malice.

13.

The Court erred in instructing the jury that although the alleged utterances to the saslesman Blackwell were

conditionally privileged yet they would give rise to a cause of action for damages if they were made with malice toward the plaintiffs. An utterance to employees or business associates upon a proper subject cannot give rise to a cause of action for slander since in law such an utterance is not a "publication".

14.

The Court erred in not restricting the Plaintiffs' right to recovery to a finding that the utterances alleged in the complaint to have been made were in fact made, but to charge the jury time and time again that a recovery would be authorized if utterances were made that "were intended to mean and did mean" and the "meaning and intendment" in the light of the surrounding circumstances was that Plaintiffs would cheat and defraud their customers, the Court thereby supplying the unpleaded innuendo as to the meaning and intendment of the actual statement or statements made.

15.

The Court erred in charging the jury that there was evidence that the alleged slanders were uttered not only to the customer Boler but to "other customers" as well.

16.

The Court erred in refusing to define "malice" as requested by this Defendant and in connection with his charge defining malice, summing it up to state that it "need be no more than the antipharsis or op-

posite of good faith", thereby completely nullifying all of the instruction preceding this summary as to the meaning of "malice."

17.

The Court erred in charging the jury that the burden of proof was upon the Defendants to establish that the statements made were true.

18.

The Court erred in refusing to accede to the jury's request, shown by the record to have been made shortly after 10:25 P.M., May 25, 1956, that the Court explain to the jury again the part of his charge dealing with the privilege question, and in this connection in refusing the request of Defendant that the Court comply with the jury's request and go over the law as to qualified privilege again.

19.

The Court erred in charging the jury that Plaintiffs' action was based upon claimed slanders per se and that no proof of special damage was required since Plaintiffs' action was not based upon alleged slanders per se but upon alleged slanders per quod and therefore allegation and proof of special damages were required.

20.

The verdict of the jury finding Twenty-five Thousand Dollars ($25,000.00) actual damages in favor of

Plaintiff Roto-Lith, Ltd. will not support the entry of a judgment based thereon, for the reason that said verdict of Twenty-five Thousand Dollars ($25,000.00) includes damages for loss of profits and there is no substantial evidence that Roto-Lith, Ltd. lost any profits in the past as the natural and proximate result of the alleged slander.

Respectfully Submitted,

FISCHER, WOOD, BURNEY & NESBITT,

1903 Driscoll Building,
Corpus Christi, Texas.

COX, WAGNER, ADAMS & WILSON,

P. O. Box 953,
Brownsville, Texas.

By FRED B. WAGNER,
Of Counsel.

OPINION OF THE COURT.

Filed October 6, 1956.

(Title Omitted.)

Ewers, Cox & Toothaker, McAllen, Texas, for Plaintiffs.

Fischer, Wood, Burney & Nesbitt, Driscoll Bldg., Corpus Christi, Texas, Cox, Wagner, Adams & Wilson, P. O. Box 953, Brownsville, Texas, for Defendants.

October 5, 1956.

Action for damages for slander by plaintiffs, resident citizens of New York, against defendants, resident citizens of Texas.

Plaintiffs' evidence, accepted by the jury, showing a course of vicious, malicious, slanderous false statements made by defendant, Meyer, General Manager of Texas Plastics, concerning plaintiffs after having accepted the run of plaintiffs' business establishment and securing information as to business methods before setting up in competition with plaintffs. It shows a wanton adoption and approval of such slanders by Vahlsing, Sr., owner of Texas Plastics and against Vahlsing, Jr., his son. The cold record cannot disclose the arrogance, ruthlessness and vicious indifference to these wrongs by the Vahlsings. This attitude on their part probably accounts for the fact that the jury awarded $50,000 exemplary damages as against only $25,000 actual damage.

Defendants move for new trial upon grounds which will be discussed as stated. The first and most serious question, dealing with the form of verdict, is one for which the Court feels responsible. It should have been caught by the Court and counsel when the verdict was returned but, as shown by the record, the trial was long drawn out and all were tired. There was no objection by counsel at the time and I have concluded that the objection now made is more apparent than real. The Court instructed the jury with reference to the form of their verdict, without objection, as follows: [1]

"Now, for that reason, I have worded a form of verdict which you may use or not use, as it may suit your convenience; first, in the event of a verdict for the plaintiffs, 'We, the jury, find for the plaintiff, Roto-Lith, Limited, and against the defendants, for blank damages.' I mean there the nominal or actual damages that you may see ift to award. Now the second section, 'We further find for the plaintiffs and against the Defendant Texas Plastics, Inc., and/or Fred J. Meyer, exemplary damages in the sum of blank dollars.' If you determine that exemplary damages should be awarded, then you will determine whether or not they should be awarded solely against the man making the statement or against Texas Plastics or against both, and you can strike out 'and/or' and strike out either one of those names just whatever you find. I am just simply trying to assist you. The third form of verdict is in the event of a verdict for the defendants, 'We , the jury, find for the defendants.' "

[1] Emphasis supplied throughout this memorandum.

The jury's verdict was as follows:

"We the jury, find for the Plaintiff, Roto-Lith, Ltd., and against the Defendants for $25,000.00 damages.

"We further find for the Plaintiffs and against the Defendant Texas Plastics, Inc. and/or Fred J. Meyer exemplary damages in the sum of $50,000.00.

Defendants now lodge objections to the form of such verdict as follows:

First: No actual damages were awarded to plaintiff, Borak, therefore there could be no award to him of exemplary damages.[3] But this overlooks the Court's instructions, emphasized above, that "in the event of a verdict for the plaintiffs" they might use, or not use, the form of verdict "We, the jury, find for the plaintiff, Roto-Lith, Limited, and against the defendants, for blank damages." Of course, it would have been better if the Court had told the jury to find, or not find, for each plaintiff, separately, but the jury seems to have taken the instruction literally. Since Borak was president of Roto-Lith and the only officer of that company to testify, it was quite logical for the jury to accept the two as one in interest, as did everyone else connected with the trial, and award damages to both in the name of one, especially in view of the Court's instruction. As stated, there was no objection to either the instruction or the form of verdict. All of us assumed at the time of verdict that it was in favor of both plaintiffs or actual as well as exemplary damages.

[3] 13 Tex. Jur. 376. The Court instructed the jury that they could award exemplary damages only if actual damages had been found.

Although defendants contend to the contrary, there was ample evidence to justify the award of $25,000 actual damage to either plaintiff. So defendants' present objection is leveled first and foremost to the proposition that: (a) the verdict must be construed as finding no actual damages for Borak personally; (b) since the $50,000 exemplary damages was awarded to both plaintiffs, it cannot be known how much was intended for Borak and how much for Roto-Lith and, therefore, the verdict is void. Manifestly the second contention (b) fails if the verdict be construed, as I believe it should, as being for both plaintiffs. While I believe the verdict for exemplary damages was justified, especially in view of the arrogant attitudes of the Vahlsings and defendant Meyer on the trial, I have concluded that I should require a remittitur of $25,000 of the exemplary damages.

Second: Defendants also object—belatedly—to the form of the verdict as to exemplary damages because of the use of the language finding "against the Defendant Texas Plastics, Inc. and/or Fred J. Meyer," contending that it is so uncertain as not to constitute a verdict against either defendant. A number of criminal cases [3] are cited condemning the use of "and/or" in search warrants, verdicts, etc. These are, of course, distinguishable since certainty is demanded, and alternative allegations are seldom permitted, in criminal cases. The civil cases [4] cited likewise are dis-

[3] Woods v. State, (Tex. Cr. App.) 136 S.W. (2d) 30; Allen v. State, (Tex. Cr. App.) 136 S.W. (2d) 232; Compton v. State (Tex. Cr. App.) 91 S.W.(2d) 732; Cobb v. State (Tex. Cr. App.) 139 S.W.(2d) 272;

[4] American General Insurance Co. v. Webster, (Tex. Civ. App.) 118 S.W.(2d) 1082; see also cases 154 A.L.R. 866.

tinguishable. The meaning of the expresson "and/or" depends upon the circumstances in a particular case.[5] Here, there can be no doubt, especially in view of the Court's instructions quoted above and the language used in the verdict, that the jury intended to award exemplary damages against each of the defendants and both of them, jointly and severally.

Defendants next complain of the Court's charge as to allowance of actual damages, especially loss of future profits to Roto-Lith, insisting that the evidence was insufficient to justify any award at all to the corporation.[6] As to loss of profits in the past there is no doubt in my mind that there was ample evidence; and, I think, the circumstances were sufficient to justify an award as to future profits. The Defendants did not, however, except to the instructions at the time in language remotely resembling that used on brief in the motion for rehearing—especially as to there being no evidence as to loss of future profits. The exceptions at the time were:

"2 That the Court has instructed the jury that actual damages may be awarded, when there is no proof to sustain an award of actual damages.

"3. That the Court has instructed the jury that they may award damages for loss of profits, when there is no evidence showing a loss of profits proximately resulting from the slander complained of and of which there is any evidence."

[5] 3 C.J.S. 1069

[6] Citing among other cases, Scheonberg v. Forrest, (Tex. Civ. App.) 253 S.W. (2d) 331.

The foregoing did not state distinctly the point now made as to future profits as required by Rule 51, Federal Rules of Civil Procedure. Defendants, therefore, are not entitled to complain.

Defendants' next contention is as follows:

"The Court Erred in Instructing the Jury that Texas Plastics was Liable in Actual Damages for any Slanderous Statements made by Fred Meyer, and that if Fred Meyer was the General Manager of Texas Plastics, His Malice would be Attributed to the Corporation."

Defendants did not lodge such an objection or exception to the charge when given an opportunity to do so. The only objection was as follows:

"The Court has erroneously charged the jury that they may find that Fred Meyer is a 'superior officer' of Texas Plastics when there is no evidence to support such a finding."

There was such evidence. Defendants admitted in their answer that Meyer was General Manager of the corporation. At the very outset, he was asked by defense counsel: "Are you the manager of Texas Plastics, Inc., that we have been hearing about?" (TR. p. 526); and, under cross examination, he testified (Tr. p. 571) that he was general manager. He was the only one of the officers of Texas Plastics that actually lived in Texas where the plant is located. The Vahlsings actually lived and had their offices in New York. Meyer later attempted to qualify his testimony as to being General Manager, apparently in

view of Vahlsing senior's snarling testimony that he was only a plant manager; but his admissions under cross examination indicated that he received instructions to consider himself plant manager only after this action was filed.

So unquestionably there was evidence to justify the jury in finding that he was general manager and, therefore, a superior officer of the corporation—the only point raised by defense counsel at the time. The charge of the Court as to a corporation's being liable for exemplary damages for malicious slander by its general manager was based on the following statement from 27 Tex. Jur. 709, section 60:

"A corporation may be liable in exemplary damages for libel or slander when the fraud, malice, gross negligence or oppression essential to the recovery of exemplary damages was committed by or could be attributable to the corporation itself, or some superior officer representing it, or some subordinate agent or servant whose act was previously authorized or subsequently ratified or approved by the company or some superior officer after knowledge of the facts. Thus a corporation is liable in exemplary damages for defamation by one of its superior officers, though his malicous conduct was nether authorized nor ratified by the company. But it is not so liable for the acts of employees who are not officers or controlling agents representing the company in its corporate affairs, unless it is shown that the company authorized or subsequently ratified their acts. . ."

The foregoing was and still is the law in Texas. The leading authority cited in the text is St. Louis, S.W. Ry. Co. v. McArthur (Tex. Civ. App. 72 S.W. 76 (error refused by the Supreme Court), holding that the railroad company was responsible for the malicious utterance of its general passenger and ticket agent without showing authority or ratification. Defendants' counsel now have seized upon a statement as to a minority rule in 13 Am. Jur. 1055, section 1127, that "there are a few cases which hold. . .that a corporation is not liable for slander spoken by its officer or agent . . . if the corporation has not expressly directed or authorized him to speak the words in question or subsequently ratified them" One Texas case is cited—Cyrus W. Scott Mfg. Co. v. Millis (Tex. Civ. App.) 67 S.W. (2d) 885 But that case involves a letter written by a sales manager—held to be an employee of the company. The Court said: "The slander charged as words spoken by an employee of the defendant corporation, and in such case it was necessary to allege and prove that such act of the employee was authorized by the corporation or that it was ratified by it. . ." The Millis case simply follows the rule announced in Texas Jurisprudence quoted above. While the Court thereafter quotes from 17 R.C.L. s 135, a statement that the strict rule has been laid down as to a corporation's agent or officer, this was not necessary to a decision and did not purport to change the rule as to liability for exemplary damages for slander by a superior officer of a corporation recognized in all the cases.[1] "The term general manager

[1] St. Louis & S.W. Ry. Co. v. McArthur, supra; Western Union Tel. Co. v. Brown, 58 Tex. 174; "It is now the settled law of this state, that, to

of a corporation, according to the ordinary meaning of the term, indicates one who has general direction and control of the affairs of a corporation."[8] The terms general manager and general agent of a corporation are held to be synonymous.[9] Defendants surely knew this when they admitted in their pleadings that Meyer was general manager of the corporation. They asked for no definition or instruction as to general manager or superior officer; and, as pointed out, the only exception to the charge in this respect was that the Court had "erroneously told the jury that they may find that Fred Meyer is a superior officer of Texas Plastics when there is no evidence to support such a finding." As a matter of fact the Court told the jury as follows:

> make a corporation liable for exemplary damages, the 'fraud, malice, gross negligence or oppression' which must authorize and justify the same, must have been committed by the corporation itself, or some superior officer representing it in its corporate capacity; or, if committed by a subordinate servant or agent, the act must have been previously authorized, or subsequently ratified or approved by the company or such superior officer after knowledge of the facts"
>
> See also cases cited in footnote 16, 17, Tex. Jur. 709.

[8] 10 Tex. Jur. 981, § 325; Continental Supply Co. v. Forrest E. Gilmore Co. (Tex. Civ. App.) 55 S.W. (2d) 625.

[9] 2 Tex. Jur. 402, § 19; Pittsburg Pipe & Supply Co. v. Federal Machine & S. Co., (ex. Civ. App.) 107 SW.2d 637.

"Now so far as malice is concerned, of course a corporation could only be guilty of malice through its superior officers. In this case, the time—at the time of the utterance, the malice is attributed to the man that uttered them, Harry Meyer, or allegedly utered; so the question arises, 'Is he a superior officer of the company?' He testified, as I recall, that he was the general manager, at one part of his testimony, and another time, he was not so sure of his title or his duties, his responsibilities, or his authority, so I am going to leave it to you as to whether he is a superior officer or not.

"In the event that you find that the slanders were uttered as alleged and that they were maliciously uttered by him, if you find that he was general manager of the company. I think he was a—I charge you that, in that event, he was a superior officer of the company and so malice could be attributed to the corporation.

"On the other hand, if he wasn't general manager, he is not a superior officer, and it couldn't be attributable to the corporation for the purpose of awarding exemplary damages."

In closing out the argument on this point, defendant urges that even if Meyer made the false statement charged, it was not in the course of his duties because both he and Vahlsing testified that he had nothing to do with sales. This is absurd; but, in any event, like most of the other matters now complained about, no objection was made at the time sufficient to direct it to the attention of the Court and afford an

opportunity to correct it. No question was raised, no instruction requested, as to Meyer's acting within the scope of his authority.

I have discussed only the questions briefed on the motion for new trial. A number of other matters are raised in the motion but counsel have not brought them forward in the briefs although three months have elapsed since the case was tried. The record has been transcribed. It shows a long, careful, and, I think, patient and fair trial.

The motion for new trial is overruled, conditioned that, counsel for plaintiffs shall within 15 days file a remttitur of $25,000 of the exemplary damages; otherwise the motion will be granted.

The Clerk will notify counsel.

JAMES V. ALLRED,
Judge.

REMITTITUR.

Filed October 10, 1956.

(Title Omitted.)

Plaintiffs in the above entitled action, Roto-Lith, Ltd. and Harry Borak, do hereby, pursuant to the order of the Court, and within the specified fifteen (15) days, file this their Remittitur of Twenty-fve

Thousand ($25,000.00) Dollars of the exemplary damages.

EWERS, COX & TOOTHAKER,
WILLIAM C. YORK,
JAMES C. ABBOTT,
1630 North Tenth Street,
McAllen, Texas.
By WILLIAM E. YORK,
Attorneys for Plantiffs.

FINAL JUDGMENT.

Filed October 11, 1956.

(Title Omitted.)

This action having been tried and a general verdict for the Plaintiffs in the sum of $25,000.00 actual damages, together with $50,000.00 exemplary damages having been duly rendered on the 26th day of May, 1956, and the Plaintiffs having, in accordance with the order of the Court, filed a Remittitur of $25,000.00 of the exemplary damages;

I is Adjudged that said Plaintiffs Roto-Lith, Ltd. and Harry Borak recover of the Defendants Texas Plastics, Inc. and Fred J. Meyer the sum of $50,000.00, together with their costs, and that they have execution therefor.

Done at Corpus Christi, Texas this 10th day of October, 1956.

(S.) JAMES V. ALLRED,
United States District Judge.

ORDER DENYING MOTION FOR NEW TRIAL.

Filed Novemer 8, 1956.

(Title Omitted.)

On Motion of Defendant, Texas Plastics, Inc., to set aside a verdict of the Jury and grant a new trial.

It is Ordered that the Motion be denied.

Done this 7 day of November, 1956.

(S.) JAMES V. ALLRED,
United States District Judge.

NOTICE OF APPEAL OF TEXAS PLASTICS, INC. AND FRED J. MEYER.

Filed November 9, 1956.

(Title Omitted.)

Notice is hereby given that Texas Plastics, Inc. and Fred J. Meyer, Defendants above anmed, hereby appeal to the United States Court of Appeals for the 5th Circuit from the Final Judgment of the Court in the above case entered the 10th day of October, 1956.

ALLEN WOOD,
(Allen Wood),
FRED B. WAGNER,
(Fred B. Wagner),
Attorneys for Appellants,
Texas Plastics, Inc. and
Fred J. Meyer.

I, V. Bailey Thomas, Clerk of the United States District Court for the Southern District of Texas, Brownsville Division, keeper of the seal and records of said Court, do hereby certify that on the 9th day of November A.D. 1956, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, I did cause to be mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

Messrs. Ewers, Cox & Toothaker,
1630 North Tenth Street,
McAllen, Texas.

V. BAILEY THOMAS,
Clerk.
By EUNICE J. GREEN,
Deputy.

BOND FOR COSTS ON APPEAL OF FRED J. MEYER.

Filed November 9, 1956.

(Title Omitted.)

We, the undersigned, jointly and severally acknowledge that we are bound to pay to Roto-Lith, Ltd. and Harry Borak, Plaintiffs, the sum of Two Hundred and Fifty Dollars ($250.00).

The condition of this Bond is that whereas the Defendant has appealed to the Court of Appeals for the 5th Circuit by Notice of Appeal filed the 9th day of November, 1956, from the Judgment of this Court entered the 10th day of October, 1956, if the Defend-

ant, Fred J. Meyer, shall pay all costs adjudged him if the Appeal is dismissed or the Judgment affirmed or such costs as the appellate Court may award if the Judgment is modified then this Bond shall be void, but if the Defendant fails to perform this condition, payment of the amount of this Bond shall be due forthwith.

Witness our hands this 9th day of November, 1956.

(S.) FRED J. MEYER,
(Fred J. Meyer),
Principal.

THE SEABOARD SURETY
COMPANY OF NEW YORK,
(S.) W. J. SHELTON,
(Seal) Agent and Attorney in Fact,
Surety.

SUPERSEDEAS BOND OF TEXAS PLASTICS, INC.

Filed Nov. 9, 1956.

(Title Omitted.)

We, the undersigned, jointly and severally, acknowledge that we are jointly bound to pay to Roto-Lith, Ltd. and Harry Borak, Plastics, the sum of Sixty Thousand Dollars ($60,000.00).

The condition of this Bond is that whereas Texas Plastics, Inc., Defendant, has appealed to the Court of Appeals for the 5th Circuit from Judgment of this Court, entered the 10th day of October, 1956, if this

Defendant shall pay the amount of Final Judgment therein, together with costs, interest and damages for delay if his appeal shall be dismissed or the Judgment affirmed or modified, then this Bond is void; otherwise to remain in full force and effect.

Witness our hands this 22 day of October, 1956.

TEXAS PLASTICS, INC.,
By (S.) F. H. VAHLSING,
Pres., Principal.
THE SEABOARD SURETY
COMPANY OF NEW YORK
By F. H. VAHLSING,
By (S.) W. J. SHELTON,
(Seal) Agent and Attorney in Fact,
Surety.

The foregoing Supersedeas Bond is hereby approved this 29th day of October, 1956.

(S.) JAMES V. ALLRED,
United States District Judge.

Board Surety Company
Home Office
100 William Street, New York 38, N.Y.

Power of Attorney

Certified Copy

No. 3873

Know all Men by these Presents: That Seaboard Surety Company, a corporation of the State of New York, has made, constituted and appointed and by these presents does make constitute and appoint W.

J. Shelton, of Corpus Christi, Texas, its true and lawful Attorney-in-Fact, to make, execute and deliver, on its behalf as Surety, bonds, undertakings and other obligatory instruments of similar nature as follows: Without Limitations.

Such bonds, undertakings and obligatory instruments for said purposes, when duly executed by the aforesaid Attorney-in-Fact, shall be binding upon the said Company as fully and to the same extent as if such bonds, undertakings and obligatory instruments were signed by the duly authorized officers of the Company and sealed with its corporate seal; and all the acts of said Attorney-in-Fact, pursuant to the authority hereby given, are hereby ratified and confirmed.

This appointment is made pursuant to the following By-Laws which were duly adopted by the Board of Directors of the said Company on December 8th, 1927, and are still in full force and effect:

Article XI. Paragraph 6:

"Atorneys-in-Fact, Department Managers, Branch Managers, Agents, Clerks, and other employees may be appointed or engaged by the President or a Vice-President, subject to the control of the Directors, upon such terms and with such powers and duties as he may prescribe."

Atricle XVII, Paragraph I: "All policies, bonds,s recognizances, stipulations and all underwriting undertakings shall be valid:

(a) When signed by the President, or the First Vice-President, or a Vice-President, or a Resident

Vice-President, or a Departmental Manager and the Secretary, or an Assistant Secretary, or a Resident Assistant Secretary, or other duly authorized official or agent of the Company, and when sealed with the seal of the Company where required by law; or

(b) When executed by an Attorney-in-Fact."

In Witness Whereof, Seaboard Surety Company has caused these presents to be signed by its Vice-President, and its corporate seal to be hereunto affixed and duly attested by its Assistant Secretary, this 14th day of June, 1956.

SEABOARD SURETY COMPANY,
By G. B. SLATTENGREN,
Vice-President.

Attest:

PAUL GILLEN,
(Seal) Assisant Secretary.

State of New York,
County of New York. ss.

On this 14th day of June, 1956, before me personally appeared G. B. Slattengren Vice-President of Seaboard Surety Company, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the State of New York; that he is Vice-President of Seaboard Surety Company, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of the said Company; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Company; and that he

signed hs name thereto as Vice-President of said Company by like authority.

GRACE LOCASTO,
(Seal) Notary Public.

Grace Locasto, Notary Public, State of New York, No. 41-7578159 Queens County, Certificate filed in New York, County, Term Expires March 30, 1958.

State of New York,
County of New York. ss.

I, W. S. Wehrell Asst. Secretary of Seaboard Surety Company, do hereby certify that the above and foregoing is a true and correct copy of a power of attorney executed by said Seaboard Surety Company, which is still in full force and effect.

In Witness Whereof, I have signed this certificate at New York, New York, this.....day of....., 19.....

W. S. WEHRELL,
(Seal) Assistant Secretary.

MOTION TO TRANSMIT ORIGINAL EXHIBITS TO THE COURT OF APPEALS AND ORDER ALLOWING SAME.

Filed December 4, 1956.

(Title Omitted.)

To said Honorable Court:

Come Now the Defendants, Texas Plastics, Inc. and Fred J. Meyer, and respectfully move the Court

to authorize and direct the Clerk of this Honorable Court to transmit to the Clerk of the Court of Appeals at New Orleans the following original papers introduced in evidence on the trial of this cause, namely:

P-1. Copy of letter from Roto-Lith, Ltd. to F. H. Vahlsing, Inc., Att. Mr. F. H. Vahlsing, Jr., dated May 11, 1954.

P-2. Copy of letter from Roto-Lith, Ltd. to F. H. Vahlsing, Inc., dated Aug. 19, 1954.

P-3. Copy of letter from Roto-Lith, Ltd. to F. H. Vahlsing, Inc., Att. Mr. Fred Vahlsing, Jr., dated July 13, 1954.

P-6. Photostatic copy of letter from F. J. Meyer to Mr. A. Pfaffenroth, F. H. Vahlsing, Inc., dated July 23, 1954, on F. H. Vahlsing, Inc. letterhead out of New York.

P-7. Original General Release from Frederick H. Vahlsing, Inc. to Harry Borak and Roto-Lith, Ltd., acknowledged Sept. 13, 1954.

D-1. Copy of Summons and Verified Complaint in the Supreme Court of the State of New York, County of New York, styled Harry Borak and Roto-Lith, Ltd., Plaintiffs against Frederick H. Vahlsing, Sr., Frederick H. Vahlsing, Jr. and F. H. Vahlsing, Inc., Defendants, dated August 19th, 1954.

D-2. Original General Release from Harry Borak to Frederick H. Vahlsing, Sr., Frederick H. Vahlsing, Jr. and F. H. Vahlsing, Inc., dated 31st day of August

1954, and signed and acknowledged same date by Harry Borak.

D-3. Invoice of Roto-Lith, Ltd., dated May 5, 1954, to Vahlsing Agricultural & Insecticide Corp., Elsa, Texas, covering 3,262.3# in rolls.

D-4. Invoice of Roto-Lith, Ltd., dated May 5, 1954, to Vahlsing Agricultural & Insecticide Corp., Elsa, Texas, No. 3989, covering 772.3# in rolls.

D-5. Copy of Defendant's First Amended Original Answer in Cause No. C-868, Roto-Lith, Ltd., a Corporation vs. Max Lutz, in the District Court of Hidalgo County, Texas, 139th Judicial District.

D-6. Invoice of Roto-Lith, Ltd., dated April 28, 1954, to Vahlsing Agricultural & Insecticide Corp., Elsa, Texas, No. 3951, covering 124# in rolls.

D-7. Copy of Schedule signed by J. Dolan showing Box Nos. and Weight, headed "Rotolith 8/2/54 5 3/4 x 11½ Carrot Bags 1500/Box, 2 yellow legal tablet sheets, and one sheet of same paper with same heading with "(Rolls)" added to heading, totalling 3 sheets altogether.

D-8. Photostatic copy of Violation issued by Department of Markets, Bureau of Weights and Measures, 137 Centre Street, New York City to Roto-Lith, Ltd., bearing No. 6515 and dated Aug. 17, 1954, covering Short Count on Polyethylene Bags.

D-9. Photostatic Copy of Special Report of M. A. Donohue, Inspector, Department of Markets Division

of Weights and Measures, dated Sep't. 9, 1954, New York, regarding count of 257 boxes of polyethylene bags submitted by Insp't. Dolan on complaint of F. H. Vahlsing, Inc., manufactured by Roto-Lith, Ltd.

D-10. Certificate of Analysis, Pattison's Southwest Laboratories, Harlingen, Texas, dated May 21, 1956, No. 78113, signed by D. H. Turner, regarding boxes of bags Nos. 1 through 7, said boxes picked up at the office of Max Lutz Packing Shed in McAllen, Texas, on May 12, 1956.

D-11a, D-11b. Certificate of Analysis, Pattison's Southwest Laboratories, Harlingen, Texas, dated May 21, 1956, No. 78114, consisting of two pages, signed by D. H. Turner, regarding boxes of bags Nos. 8 through 23, said boxes picked up at the office of Max Lutz Packing Shed in McAllen, Texas, on May 12, 1956.

D-14. Conversion Table, showing Invoice, Number, Date, Type of Bag, Weights, etc. with %Short as last column.

Dated November 13, 1956.

FRED B. WAGNER,
(Fred B. Wagner),
Attorney for Defendants.

P. O. Box 953,
Brownsville, Texas.

FISCHER, WOOD, BURNEY & NESBITT,
Driscoll Building,
Corpus Christi, Texas.
COX, WAGNER, ADAMS & WILSON,
Brownsville, Texas,
Of Counsel.

Plaintiffs consent to the Court's action on the foregoing Motion ex parte.

EWERS, COX & TOOTHAKER,
By J. C. ABBOTT,
Attorneys for Plaintiffs.

McAllen, Texas.

The above and foregoing Motion of the Defendants is granted, and It Is Ordered that the Clerk of this Court transmit to the Clerk of the Court of Appeals at New Orleans the foregoing original documents admitted in evidence on the trial to be by him safely kept and returned to this Court upon the final determination of this action in said Court of Appeals for the Fifth Circuit.

Signed this 4 day of December, 1956.

JAMES V. ALLRED,
United States District Judge.

MOTION OF ROTO-LITH, INC. FOR EXTENSION OF TIME WITHIN WHICH TO FILE DESIGNATION AND ORDER THEREON EXTENDING THE TIME UNTIL DECEMBER 12, 1956.

Filed Dec. 7, 1956.

(Title Omitted.)

Comes now plaintiffs, Roto-Lith, Ltd. and Harry Borak and move the Court to enlarge the time for plaintiffs' designation of the contents of the record on appeal and for cause plaintiffs would show that since

service of defendants' designation the petitioner herein has been absent from the District and moves the Court to allow an additional five (5) days for filing his designation.

Dated: December 7, 1956.

ROTO-LITH, LTD. and
HARRY BORAK,
By J. ABBOTT,
Attorney.

The above and foregoing motion of the plaintiffs is granted and it is Ordered that the plaintiffs shall have until the 12th day of December, 1956, within which to file its designation.

Done at Brownsville, Texas, this 7th day of December, 1956.

JAMES V. ALLRED,
United States District Judge.

12/13/56.

No designation filed by the Appellees.
F. HISE,
Deputy Clerk.

CLERK'S CERTIFICATE.

United States of America,
Southern District of Texas.

I, V. BAILEY THOMAS, Clerk of the United States District Court for the Southern District of Texas in the Fifth Circuit and District aforesaid, to hereby certify the foregoing to be a true and correct copy of the record and all proceedings had in the case as called for in the designation of contents of record on appeal, page 2, of this transcript in cause No. 940 on the Civil Docket of said Court at Brownsville, Texas, entitled Roto-Lith, Ltd. and Harry Borak vs. Texas Plastics, Inc. and Fred J. Meyer, as the same now appears on file and of record in my office.

And that in accordance with the motion to transmit original exhibits and the order thereon allowing same, which order appears on page 936 of said transcript, the original exhibits referred to in said order are herewith transmitted as a part of the transcript.

To Certify Which, witness my hand and the seal of said Court at Brownsville, Texas, in said district, this the 13 day of December, 1956.

V. BAILEY THOMAS,
Clerk, U. S. District Court,
By F. HISE,
(Seal) Deputy Clerk.

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JOHN T. FEY, Clerk

No. 907

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

TEXAS PLASTICS, INC., and FRED J. MEYER,
Petitioners,

vs.

ROTO-LITH, LTD., and HARRY BORAK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

R. DEAN MOORHEAD
P. O. Box 858
Brown Building
Austin, Texas

Attorney for Petitioners

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

TEXAS PLASTICS INC., and FRED J. MEYER,
Petitioners,

vs.

ROTO-LITH, LTD., and HARRY BORAK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Petitioners Texas Plastics, Inc., and Fred J. Meyer, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on January 9, 1958.

Opinions Below

The opinion of the Court of Appeals is reported in 250 F(2d) 844, and is printed as Appendix "A" hereto. The judgment of that Court is printed herein as Appendix "B". Seemingly, the opinion of the trial court has not been reported, but it is set forth in R. 749-759. Pursuant to this Court's Rule No. 23 (i) that opinion is not being copied herein since nine additional printed copies of the record are being filed.

Jurisdiction

As noted above, the judgment of the Court of Appeals was rendered on January 9, 1958. No motion for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Respondents instituted this suit in the federal courts upon the ground of diversity of citizenship. Petitioners admit that diversity jurisdiction exists.

Questions Presented

1. Whether a jury finding awarding actual damages to one plaintiff can be tortured into an award of damages to two plaintiffs.

2. Whether, in the absence of an award of actual damages to one plaintiff, an unapportioned award of exemplary damage to two plaintiffs can be sustained.

No Statute Is Involved

No statute or other enactment of a legislative nature is involved in this case.

Statement

This is a suit in which Respondents Roto-Lith, Ltd. and Harry Borak, its president, sued Petitioners for slanderous statements allegedly uttered by Petitioners Fred J. Meyer in the scope of his employment (which Petitioners deny) as plant manager of the Petitioner Texas Plastics, Inc.

Petitioner Texas Plastics, Inc., and Respondent Roto-Lith, Ltd. are both engaged in the maunfacturing and sale of quasi-cellophane plastic bags (technically called poly-ethylene bags) which are used for the primary purpose of packaging vegetables. Allegedly, Petitioner Meyer made his remarks while he was attempting to promote sales of the products of Petitioner Texas Plastics, Inc., by the technique of disparaging Respondent Roto-Lith, Ltd.

The jury found actual damages in the amount of $25,000 in favor of the Respondent Roto-Lith Ltd., but it found no actual damages in favor of Respondent Harry Borak (R. 741). Notwithstanding its failure to find actual damages in favor of the latter Respondents, the jury awarded both Respondents exemplary damages in the amount of $50,000 (R. 741). The jury did not make any apportionment of exemplary damages between the two Respondents. The trial judge required a remittitur of $25,000 of the exemplary damage award, but entered judgment

for $50,000 in favor of the two Respondents (R. 760). That judgment was affirmed by the Court of Appeals for the Fifth Circuit.

Reasons For Granting The Writ

The basic reasons for granting the writ are these:

1. The Court of Appeals has decided an important question of state law in a way in conflict with the law of such state.

2. The Court of Civil Appeals has sanctioned a departure by the trial court from the accepted and usual course of judicial procedure in such manner as to call for an exercise of this Court's power of supervision.

This entire petition for certiorari centers around the question:

> *If a jury returns a verdict in favor of one persons, can judgment theron be rendered in favor of two persons?*

The facts and authorities pertinent to such question are as follows:

It Was Error to Award Any Actual Damages to Respondent Harry Borak

Two plaintiffs filed this lawsuit, to-wit Respondents Roto-Lith, Ltd., and Harry Borak. Each plaintiff alleged that it had been slandered by Petitioners. In their complaint, the two plaintiffs made *separate prayers* for damages and asked for differing amounts

(R. 7-8). In no sense were the causes of action alleged by the two plaintiffs joint; rather, event though they allegedly arose out of the same events, they were separate and distinct. If Roto-Lith, Ltd., recovers from Petitioners, Harry Borak will have no financial interest in its recovery, and the converse is also true.

In answer to the issue on actual damages, the jury found (R. 741):

"We, the jury, find *for the plaintiff Roto-Lith, Ltd.*,[1] and against the defendants for $25,000.00 damages."

This is the sole jury finding with respect to actual damage. As can readily be seen, the jury found such damages only with respect to "the plaintiff Roto-Lith, Ltd.," and it made no finding of actual damages whatever with respect to Harry Borak.

Notwithstanding these facts, the trial court recited in its judgment (R. 760) that the jury had returned "a general verdict for the *Plaintiffs* [using the word in the plural] in the sum of $25,000 actual damages," and the trial court then proceeded to award Harry Boark actual damages, as well as exemplary damages.

Obviously, the trial court's judgment is wholly erroneous in this respect. The jury said it found actual damages with respect to "the plaintiff Roto-Lith, Ltd.," with no mention of Harry Boark, yet despite the clear and unambiguous words of that verdict, the trial court stated in its judgment that

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[1] Unless expressly stated otherwise herein, all emphasis has been added.

the jury found actual damages for both plaintiffs, and, in the face of the jury verdict, the trial court awarded actual damages to Harry Borak, as well as to Roto-Lith, Ltd.

In its memorandum opinion, the trial court contended that by finding for "the plaintiff Roto-Lith, Ltd." the jury in fact found for both plaintiffs. Seemingly, this devious and most puzzling reasoning is based upon the premise that the court thought that, in its charge to the jury, it told the jury that if the jury desired to find for *both* plaintiffs, it should find for "the plaintiff Roto-Lith, Ltd." It is indeed difficult to comprehend the curious logic that a jury finding in favor of *one* plaintiff, and a judgment thereon in favor of *two* plaintiffs, can be upheld upon the ground that if the jury in fact wanted to make a finding in favor of both plaintiffs, it should state in its verdict that it found in favor of one.

Nevertheless, both courts below have so held.

Most certainly, it would seem that this Court should not condone any such weird procedure, and that this Court should therefore reverse the judgments below. The importance of the matter is not confined to the parties to this litigation. Rather, if such a practice is to be sanctioned, it can affect every actual or potential litigant in the entire nation.

When a jury states in plain, unmistakable, and unequivocal English that it finds actual damages for "the plaintiff Roto-Lith, Ltd.," its statement should be held to mean exactly that, and no more. When a jury fails to state that it finds actual dam-

ages in favor of Harry Borak, its failure should also be construed exactly according to its implications, i.e., that the jury in fact found no actual damages in favor of Harry Borak. If a jury returns a verdict in favor of "A," how can it be supposed, surmised, or held that the verdict is in fact in favor of both "*A and B*," and that a judgment thereon can be rendered in favor of both. In the words of the Mr. Bumble of Charles Dickens' classic, "If the law supposes that . . . the law is an ass, a idiot."

Since Respondent Harry Borak Was Not Entitled To Actual Damages, It Was Error To Award Him Exemplary Damages

As was said at the outset of this petition, the jury awarded $50,000 in exemplary damages, $25,000 of which was remitted by order of the trial court. This award was in favor of both Respondents, and the trial court rendered judgment for $25,000 exemplary damages in favor of both (R. 760). Here again the trial court erred and its error was affirmed by the Court of Appeals.

A rule established by numerious decisions in the State of Texas is thus stated on 13 *Tex. Jur. 378:*

"Where the judgment for actual damages is unsupported, a judgment for exemplary damages cannot stand."

Illustrative of the cases so holding are *Fort Worth Elevator Co. v. Russel*, 123 Tex. 128, 70 S.W. (2d) 397; *Byrd v. Fielding*, 238 S.W. (2d) 614; *Anderson v. Alcus*, 42 S.W. (2d) 294; and *Dees v. Thomp-*

son, 166 S.W. 56. A comprehensive collection of Texas cases supporting the rule announced in the above quotation is contained in 17 A.L.R. (2d) 544. As is held in *Anderson v. Akers*, supra, the rule is so rigid that even though a party is awarded nominal damages an award to him of exemplary damages cannot be upheld.

As is said in the preceding subdivision of this petition, Harry Borak was improperly awarded actual damages. With that being true, the award to him of exemplary damages cannot possibly be sustained unless the above quoted rule is wholly ignored.

Since The Award Of Damages Was Not Apportioned No Award Can Be Made To Anyone

The jury finding on exemplary damages was as follows (R. 741):

"We further find for the plaintiffs [with the plural being used in striking contrast to the lone finding for the plaintiff Roto-Lith Ltd. which was made in connection with the finding on actual damages] and against the defendant Texas Plastics, Ins. and/or Fred J. Meyer, exemplary damages in the sum of $50,000.00"

Thus, although the jury found exemplary damages in favor of both parties, it did not apportion such damages between them. The judgment of the trial court also was joint and made no apportionment (R. 760). This failure to apportion precludes the awrading of exemplary damages to either Respondent.

As is noted in the initial statement of this case, the causes of action asserted by Respondents are *separate*, not joint. Respondent Roto-Lith alleged that it was entitled to exemplary damages in the amount of $125,000, and Respondent Harry Borak thought that he should have $75,000 (R. 7-8). The damages according to the allegations—and also according to the nature of the situation—necessarily would have to be several, rather than joint. Roto-Lith, Ltd. could have no interest in the damages recovered by Borak, and vice-versa.

The situation is precisely the same as if Roto-Lith, Ltd. and Borak had filed separate suits, and the suits had then been consolidated for trial. The proper procedure in such a situation is illustrated by *Rapid Transit Ry. Co. v. Miller*, 85 S. W. 429 (refused). In that case, separate suits arising out of the same event were consolidated and tried together. In discussing the form of the verdict, the Court said:

"The suits of Miller and Whitehead having been consolidated and the plaintiffs having no joint interest in the respective recoveries sought, *separate findings were necessary.*"*

What part of the $50,000 the jury meant to award to Roto-Lith, Ltd. and what amount to Borak is not stated in the verdict. If the jury had known that, since it did not award actual damages to Borak, he

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*It is interesting to note that, although the trial court refused to hold that separate findings "were necessary" in the case at bar, the court conceded in its opinion (R. 751) that "it would have been better if the Court had told that jury to find, or not find, for each plaintiff separately."

was not entitled to any evemplary damages, would it nevertheless have wanted Roto-Lith, Ltd. to receive $50,000? Such a question can be answered only by surmise, but seemingly the answer would be in the negative, since the jury obviously wanted Broak to receive some unknown portion of the $50,000. At the same time, however, there is no possible way to determine what portion of the exemplary damages the jury wanted him to have. Certainly, though, whatever might be the amount that the jury wanted Borak to have, such amount cannot be awarded to someone else. Since Roto-Lith, Ltd. asked for $125,000 in exemplary damages and Borak asked for $75,000, it might be argued that they should share in proprotion to their allegations, and that Roto-Lith, Ltd. should at least receive five-eights of the exemplary damages. However, there is no indication whatever that the jury awarded damages according to any such formula, and any attempt by the courts to apportion the exemplary damages upon any such formula would be based only upon thin surmise.

It might also be argued that the jury thought that each Respondent should have one-half of the award. But here again is mystery and obscurity, for nowhere in the verdict did the jury say so. The jury simply did not apportion the amount of exemplary damages, and the recovery is not joint. Since there is no conceivable way to tell how much exemplary damages the jury intended to give Roto Lith, Ltd. and how much it intended to give Harry Borak, and especially since Harry Borak is not entitled to any such damages because he was not properly awarded actual damages, no award of exemplary damages

can be sustained in this case. Regardless of what disposition this Honorable Court might make of the case, it should strike from the judgment of the trial court the award of exemplary damages.

Moreover, even though it could be thought (as did the trial court), that the verdict pertaining to actual damages was in favor of both Respondents, instead of being in favor of only Roto-Lith, Ltd., as the words of the verdict plainly state, another problem arises. Counsel for Petitioners ordinarily are loathe to use citations from Texas Jurisprudence, but so many elementary princples of law are involved in this case—principles which militate against the judgment of the trial court and which demonstrate the mainfold errors therein—that they are using several such citations. In connection with the instant matter, it is stated in *18 Tex. Jur.* 396 that:

"The amount of exemplary damages should be reasonably proportioned to the actual damages sustained."

Hence, if the unwarranted assumption is made that the $25,000 award of actual damages was for both Respondents, such award was not apportioned between them, just as the award of exemplary damages also was not apportioned. Thus, it is utterly impossible for this or any other court to determine that the amount of exemplary damages which the jury meant to award Roto-Lith, Ltd. or Harry Borak has any reasonable relationship to the amount of actual damages meant to be awarded to either such Respondent. The situation is one in which the

problem has two unknown "x's," and it is elementary algebra that such a problem cannot be solved.

The Importance of the Case

Petitioners are well aware that this Honorable Court does not function to provide litigants another forum for review. Necessarily this is so, and Petitioners realize that the Court cannot confine its attention to the question of whether Petitioners should or should not pay Respondent's $50,000 for the alleged slanderous statements.

However, as is said above, this case has importance over and above that to the parties. If a verdict in favor of one plaintiff can be enlarged into a verdict in favor of two plaintiffs, dangerous violence to our law has been done. If a plaintiff can recover exemplary damages without properly recovering actual damages, then most certainly the laws of the State of Texas is violated, and so also, it is believed, is the law of almost all other states.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted, and it is so prayed.

Respectfully submitted,

R. DEAN MOORHEAD
P. O. Box 858
Brown Building
Austin, Texas

Attorney for Petitioners

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16434

TEXAS PLASTICS, INC., and FRED J. MEYER,
Appellants,

versus

ROTO-LITH, LTD., and HARRY BORAK,
Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before TUTTLE, JONES and BROWN, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal from a judgment following a jury verdict in a slander suit. The jury returned a verdict against the defendants Meyer and his employer, Texas Plastics,

Inc., for $25,000 damages and $50,000 exemplary damages. The trial court denied defendant's motion for new trial on condition that plaintiffs agree to a remittitur of $25,000 on the exemplary damage part of the verdict. This was agreed to, and defendants appealed from the juddgment as finally entered against them for $50,000.

The grounds of appeal fall generally into two categories. The first group of contentions relate to the form of the verdict, and its effect on the judgment of the court. The second group goes to the merits of the case. They deal with the Texas law of slander and its application to the facts proven below.

The Form of Verdict

The suit was brought by Harry Borak and Roto-Lith, Ltd., a corporation of which he was president, against Fred Meyer and Texas Plastics, Inc. The Court charged the jury, without objection from the defendants:

> "Now for that reason, I have worded a form of verdict which you may or may not use, as it may suit your convenience; first, in the event of a verdict for the plaintiffs, 'We, the jury, find for the plaintiff, Roto-lith, Ltd., and against the defendants, for blank damage.' I mean there the nominal or actual damages that you may see fit to award. Now the second section, 'We further find for the plaintiffs and against the defendant Texas Plastics, Inc., and/or Fred J. Meyer, exemplary damages in the sum of blank dollars.' If you determine that exem-

plary damages should be awarded, then you will determine whether or not they should be awarded solely against the man making the statement or against Texas Plastics or against both, and you can strike out 'and/or' and strike out either one of those names, just whatever you find. I am just simply trying to assist you. The third form of a verdict is in the event of a verdict for the defendants, 'We, the jury, find for the defendants.'"

The jury entered its verdict on the form prepared by the trial judge.[1]

The defendants made no request to have the form of the jury's verdict clarified, but in a motion for new trial they asserted that the verdict for the verdict for the plaintiff (the word "plaintiff" being in the singular) constituted a finding in favor of Roto-Lith, Ltd. only; that such verdict therefore would not support the judgment for actual damages in favor of both plaintiffs; that since exemplary

[1] This form, as completed by the jury, is here duplicated:

"VERDICT OF THE JURY.
Filed May 26, 1956.

We, the jury find for the plaintiff, Roto-Lith, Ltd., and against the defendants for $25,000.00 damages.

We further find for the plaintiffs and against the defendants, Texas Plactics, Inc., and/or Fred J. Meyer, exemplary damages in the sum of $50,000.00.

HUBERT K. PORTER,
Foreman.

or

We, the jury, find for the defendants.

_____,
Foreman."

damages cannot be awarded except where there is a finding of actual damages,[1] and it being apparent that part of the award of exemplary damages was intended to be for Borak, for whom no actual damages were awarded, the verdict was deficient because of this patent error.

By their motion for a new trial defendants also contended that the finding of exemplary damages in favor of the plaintiffs and against "Texas Plastics, Inc. and/or Fred . Meyer" is too indefnite and uncertain, because of the use of the words "and/or", to support a judgment.

Upon overruling the defendants' motion for new trial, the trial court entered a judgment in favor of both plaintiffs and against both defendants for the sum of $50,000, there having been filed a remittitur of $25,000 of the exemplary damages.[2] The trial

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[1] For this proposition appellants cite 13 Tex. Jur. 378.

[2] The final judgment is as follows:

"FINAL JUDGMENT.
Filed October 11, 1956.

"This action having been tried and a general verdict for the Plaintiffs in the sum of $25,000:00 actual damages, together with $50,000.00 exemplary damages having been duly rendered on the 26th day of May, 1956, and the Plaintiffs having, in accordance with the order of the Court, filed a Remittitur of $25,000.00 of the exemplary damages;

"It is Adjuged that said Plaintiffs Roto-Lith, Ltd. and Harry Borak recover of the Defendants Texas Plastics, Inc. and Fred J. Meyer the sum of $50,000.00 together with their costs, and that they have execution therefor.

"Done at Corpus Christi, Texas, this 10th day of October, 1956.

(S) JAMES V. ALLRED,
United States District Judge"

court thus construed the jury's verdict "We, the jury, find for the plaintiff, Roto-Lith, Ltd., and against the defendants for $25,000.00 damages" as a verdict for the plaintiffs, Borak and Roto-Lith, Ltd. In light of the charge to the jury quoted above, we have no doubt as to the correctness of this action by the trial court. The court had specifically stated to the jury that if they found a verdict for both the plaintiffs they could use the written form prepared by the court provided: "We, the jury, find for the plaintiff, Roto-Lith, Ltd." In the absence of any objection by the defendants that there was an inconsistency in this form of verdict and in view of the fact that there was never any issue in the case which would have made a recovery for Borak stand on any different basis from a recovery for Roto-Lith, Ltd., we see no reason why the jury's verdict should not be taken to mean exactly what the trial court said it did mean when he submitted the form to them for their action. We therefore hold that the verdict of the jury was properly construed by the court to constitute a joint verdict in favor of the plaintiffs against the defendants.

This conclusion answers the next contention of appellants. The fact that the jury found both plaintiffs entitled to actual damages for the defendants' tort supports the verdict for both of them for exemplary damages which was returned by the jury. Defendants will not now be heard to complain that a separate finding in favor of each plaintiff was necessary. If it had desired such a finding it had

ample opportunity to object to the court's charge at at the time the case was submitted to the jury. Moreover any failure to differentiate between plaintiffs is not harmful to the defendants, since the judgment against them can be wholly satisfied by the payment to them jointly as in the form of the judgment.

Finally, appellants make much over the use of the jury of the words "and/or" in the verdict. This expression was authorized by the court in its charge. It also was made without objection and also without a request of counsel, after the verdict, for a clarification. The only question then is whether the trial judge correctly interpreted the effect of the jury's verdict in finding, as to the exemplary damages, against Texas Plastics, Inc., and/or Fred J. Meyer. Clearly the court was right in determining that this verdict was nothing more or less than a joint verdict. It justified a judgment against one and the other, which if satisfied by one is satisfied as to both, but if unsatisfied as to one, then can be collected in the alternative from the other.

We have heretofore considered in a criminal case the effect of a failure by a party to object to a court's charge in submitting the issue to a jury. *Williams v. United States*, 5 Cir., 238 F. 2d 215. If an ambiguity in a jury's verdict is not to be the basis of reversal on appeal in a criminal case when it results from a charge of the court not excepted to, then clearly appellants in this civil case have waived any right to criticize the form of the jury's verdict which was a product of the court's instruction. See

also *Boice v. Bradley*, 92 F. Supp. 750, 756, aff'd. 9 Cir., 194, F. 2d 80, where the trial court said:

> "The jury was advised as to the limit it could go in assessing damages against the defendant. For the Court to say to a jury, this you can do, and then when the jury has acted, say that it acted wrongly, discredits the Court if the Court on that ground set aside the verdict."

Contentions On the Merits

On the merits of the case, the record discloses testimony from which the jury could finds the following facts: After the plaintiffs had sold a substantial volume of polyethylene bags to one Vahlsing, apparently with complete satisfaction, the latrepresented that he planned to make his own bags for use in his very extensive fruit and vegetable business in Texas; that at Vahlsing's request Borak permitted the defendant, Fred Meyer, to come in and inspect Roto-Lith's plant and learn all about the manufacturing of the bags; that thereafter Vahlsing organized Texas Plastics, Inc., of which Meyer was made General Manager. This company started manufacture of bags in competition with Roto-Lith. Meyer negotiated a contract with Lone Star Bag Company to sell Texas Plastics' bags throughout the Rio Grande Valley fruit and vegetable area of Texas. In conversations with sales men of Lone Star, Meyer told them that they would run into competition who were "cheap-chisslers," telling them specifically about Roto-Lith, that they had short-

counted the trade and telling one of them that Roto-Lith and Borak were "crooks"; that Vahlsing had sued Roto-Lith and recovered a substantial amount for short count. Meyer made the same statements to a customer, Boler, who testified that Meyer had told him "Harry Borak was a crook and a thief, or something of that sort."[4] When confronted by Borak with these statements Meyer admitted not only making them but admitted their falsity.[5] The mak-

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[4] This testimony was as follows:

". . . in the meantime, well, Fred Meyer told me that—about this experience that they had had with Roto-Lith Company, that they had been shorted, and he told me that Harry Borak was a crook and a thief, or something of that sort, that I would, he believed, be shorted on my count, and that maybe the weight too . . . . frankly, I was nervous, I thought maybe I was going to get hung, so I put some—I hired some girls that worked in my shed, and I had them to go count them, to be perfectly frank about it, and the bags were from ten to forty bags extra in every box I counted. I didn't find any boxes short, and I did continue to check them, because—we worked on a very small percentage of money, I mean a nickel or a dime a crate, that is about the kind of profit we make, so we can't afford to—we use from five to seven million bags a year; we can't afford to come up short or not get what we are paying for so I have counted these bags a good many times, and up to now, I haven't found any shortage at all."

[5] Part of the testimony as to Meyer's admission was as follows:

"A. I told Mr. Meyer that Mr. Boler had told me that he called me a crook. "If you do business with Mr. Borak, his price may be a few pennies less, but in the end, it will cost you more. I have got the proof. It was me who got money back for Vahlsing from Roto-Lith because I proved that they were crooks. I had them fined. The Bureau of Weights and Measures finded them besides, and whatever

ing of these statements greatly affected Borak in that "I was sick about this. This whole thing had collapsed on me," particularly the refusal of Vahlsing, as president of Texas Plastics, to repudiate the stories. Borak and Roto-Lith were put in a difficult competitive position, requiring them to cut their prices. A corporate profit of $60,000 for 1954 was followed by a loss of $71,00 in 1955, the year during which the statements by Meyer were allegedly made. Borak was personnally hurt and upset by the spreading of these stories among potential customers, and he asked Vahlsing to retract them on behalf of Texas Plastics. Vahlsing declined to do so.' The

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you buy from them at, no matter what price, it will cost you more in the end because he will steal from you.

. . . .

Q. All right, then, what did you say to Mr. Meyer?

A. Then Mr. Meyer said to me, 'Harry, it was stupid of me. I lied. I thought it would help me in my selling. I realize I made a mistake. I will never, never do it again, I promise you. It was the stupidest thing I have ever done, to lie the way I did.' He offered me his hand. I shook hands with him and said, 'Fred, I believe you. You will never say it again.'"

"A. . . . . I called Mr. Vahlsing Senior in Corpus Christi, at a hotel. I told Mr. Vahlsing that I had just come up from the Valley and I had heard the stories, I had dinner with Mr. Fred Meyer, that he had admitted it to me and apologized.

Q. What were these—what was your exact conversation to Mr. Vahlsing? What did you tell him?

A. That I had confronted Mr. Meyer with him telling Mr. Lutz, Mr. Boler and Mr. Benson that I had been fined by the Bureau of Weights and Measures, 'that you had to

demeanor of the defendant Meyer and the corporate defendant's president, Vahlsing, was unfriendly and arrogant in the extreme, this attitude bearing on the

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sue me to get a refund of money; that I was a crook, and if they did business with me, I would cheat them.'

Q. And what did he say to you?

A. He said, "Well, I don't know.' I then told him that Mr. Lutz had given me an order for three million bags and I wanted to cancel them because Mr. Meyer had gone back to Mr. Lutz and again repeated these crooks and cheats and 'we had to find him and I will prove it to you.'

Q. When did Mr. Meyer go back to Mr. Lutz? What this a subsequent conversation?

A. After I had left the Valley, and had Mr. Meyer's promise that he wouldn't repeat it.

Q. You told Mr. Pahlsing about this?

A. I told Mr. Pahlsing about it, and that Mr. Lutz was waiting for him to call him, that he wanted to cancel the order, and would he please do so, and now that it has gone further, that the whole story is throughout the whole Valley, and I would like him to print a retraction in the newspaper, that he never had to sue me, that I never cheated him, and he refused to do it.

Q. And he state why?

A. He said something—he said to me, when I told him about printing a retraction, because I was being hurt so badly, the reason of why, he said, 'I don't retract anything. The Bahlsing—' no, 'The Vahlsing group doesn't retract anything.'

Q. Was that the end of that conversation?

A. That was the end of that conversation that day, he refused to retract, he refused to call, he refused to print anything, they don't do that."

jury's determination as to the issues of credibility and malice.'

The parties do not greatly differ as to the legal rules applicable to the determination of the issues on the merits. Appellants place much reliance on *Billington v. Houston Fire & Casualty Insurance Co.*, 226 S. W. 2d 494, as standing for the proposition that in Texas the law of slander is such that calling another "liar" and a "crook" is not actionable per se. The abstract rule is not disputed by appellees. But they point out properly, we think, that the rule stated in the Billington case is restricted to the use of such words without the allegations or proof of inuendo or circumstances from which the jury could find that the subject of these defamatory words was adversely affected in his occupation or profession.

' In the order overruling the defendant's motion for new trial, the trial court made the comment:

"Plaintiff's evidence, accepted by the jury, showing a course of vicious, malicious, slanderous false statements made by defendant, Mayer, General Manager of Texas Plastics, concerning plaintiffs after having accepted the run of plaintiff's business establishment and securing information as to business methods before setting up in competition with plaintiffs. It shows a wanton adoption and approval of such slanders by Vahlsing, Sr., owner of Texas Plastics and against Vahlsing, Jr., his son. The cold record cannot disclose the arrogance, ruthlessness and vicious indifference to these wrongs by the Vahlsings. This attitude on their part probably accounts for the fact that the jury awarded $50,000 exemplary damages as againstonly $25,000 actual damage."

Elsewhere the court spoke of "Vahlsing Senior's snarling testimony" as to one point.

The Billington case itself makes clear the distinction, the court saying:

> "The general rule is that 'oral words, however opprobrious, are not actionable without proof of special damage, unless they impute to another a commission of a crime.' . . . *An exception, however, to the rule as well established, perhaps, as a rule itself, is that 'words which affect a person injuriously in his office, profession, or corporation are actionable per se, though they are oral, regardless of the fact that they do not impute the commission of any crime.'* Mayo v. Goldman, 57 Tex. Civ. App. 475, 122 S. W. 449, 450." (Emphasis added.)

Billington v. Houston Fire & Casualty Ins. Co., 226 S. W. 2d 494, 496.

We think it quite clear that the testimony that Meyer had repeatedly stated that Boler was a *cheap chissler* and *a crook in connection* with the statement that his company *had* and would short count and short weigh customers, coupled with statements, technically false, that they had been sued for such shortchange practices, was amply to justify a finding of slander under the Texas decisions. *Mayo v. Goldman*, 57 Tex. Cic. App. 475, 122 S. W. 499.

There is no dispute as to the availability of truth as a defense. This issue was fairly presented to the jury and was rejected by it. In its determination of this, as well as the other fact issues, the jury had the opportunity to test the credibility of the witnesses as

they appeared on the witness stand. There is no appealable issue here.

On the defense of qualified privilege raised by appellants, this would go only to justify the otherwise slanderous statements made to the salesmen. The charge of the court as to this issue was certainly fair to the appellants. The court charged that "the statements made by Meyer to the salesmen were conditionally privileged and will not give rise to damages for slander even though the statements or part of them were untrue, unless Mr. Meyer, who was making the statement, made it with malice toward the person spoken about." In a proper case of conditional privilege, the parties conceded this to be the law. *Cranfiel v. Hayden*, 80 S. W. 609; *Nunn v. Webster*, 260 S. W. 157. The fact that the jury could have found that Meyers' slanderous statements were made to the salesmen for the purpose of repeating them as a part of their selling technique may well have justified the submission to the jury of the question whether the conditional privilege existed rather than for the court to have ruled it as a matter of law, but this question is not before us for discussion.

There was, of course, ample evidence of malice on the part of Meyer. In his alleged admission to Borak of having made the statement and that he "lied" and that such acts were the "stupediest thing I have ever done," together with the testimony of Boler that there was bad feeling between Meyer and Borak, together with Meyers' denial to his superior, Vahlsing, that he made the statement, reiterated on the witnessstand, taken together were proof of a malicious basis for the statements rather than a good faith

effort by Meyer to give privileged statements to his salesmen. This issue was also resolved against Meyer by the jury.

The next complaint of appellant, Texas Plastics, Inc., arises from its defense that it is not liable for slanderous statements made by Meyer. The argument is that Meyer was only an employee and that under Texas law a corporation is not liable for slander by its agents unless made by authorization or upon ratification of the corporation. For this proposition appellants cite *Cyrus W. Scott Mfg. Co. v. Mills, 67, S. W. 2d 885.* It seems clear, however, that the requirement that there be an authorization or ratification by the corporation can be met without any formal corporate action relating to the particular acts or words. This is made plain from the language used by the Texas court in *Great Atlantic & Pacific Tea Co. v. Harris,* 75 S. W. 2d 974, where on page 976 the court said:

> "The next contention is that, as a matter of law, the statement made by Grubbs was not made in the course of his employment, and that therefore no liability exists against his employer on account of its utterance. We overrule this contention. An action is sustainable against a corporation for defamation by its agent, if such defamation is referable to the duty owing by the agent to the corporation, and was made while in the discharge of that duty. Neither *express* authorization nor subsequent ratification is necessary to establish liability." (Emphasis added.)

This language is quoted in *Commercial Union Life Ins. Co. v. Moore*, 160 S. W. 2d 266, which case is relied on by appellants. A reading of this case, which is quoted at length in appellants' brief, shows that appellant misconstrued the holding of the Texas court. Instead of holding as stated in the brief, that the company in the Commercial Union Life Ins. Company case was not liable, the court held in fact that the statement by Riha, the employee, taken in connection with the fact of his employment as an investigator, was sufficient to support an inference that Riha was attempting to do what the insurance company had employed him to do, and was thus sufficient to support a finding of liability on the part of the insurance company.

We thing it quite clear that under the Texas rule the evidence would authorize a finding by the jury that when Meyer made the defamatory statements to the salesmen of Lone Star Bag Company and Boler, the customer, he was, to paraphrase the language of the court in the Commercial Union case, "attempting to do what the . . . company had employed him to do"—that is to further the sales of the company's products. This result derives from the fact that although at places in his testimony Meyer stated that he was to have nothing to do with sales, the defendant coropartion, in its answer, admitted that Meyer was the general manager of the company. Furthermore, it seems to us that this fact was conceded by defendants when their counsel, in cross examining one of the salesmen, put the following question: "And Mr. Meyer, as manager of Texas Plastics, came to Houston and had about a two or

three day indoctrination meeting with the Lone Star Bag Company salesmen?" It seems hardly permissible for appellants to contend that Meyer was not carrying on his assigned duties in conducting this sales meeting when part of their defense is based on the contention that the communication to the salesmen was conditionally privileged because he was consulting with them as to the manner of conducting their sales campaign. Moreover, the testimony is clear that when the plaintiff Borak reported to Vahlsing, the president of the corporation, that Meyer had slandered him and his company, Vahlsing made no claim that Meyer was not engaged in carrying out his appropriate duties at the time of the statements. We think it clear that the issue of liability on the part of the corporation was thus clearly presented to the jury, which resolved the issue in favor of the plaintiffs.

There remains for consideration the contention of appellants that the proof was inadequate to support a verdict for actual damages, and the related contention that the court erred in the charge to the jury on this subject. The law in Texas is no different from the general law with respect to damages for slander per se. In such a case damages are presumed and need not be proved. *Southwestern Telegraph & Telephone Co. v. Long*, 183 S.W. 421. Here the jury could find words actionable per se and no proof of damages need be made under those circumstances. However, the fact that no proof was required does not prevent or make inadmissible the plaintiffs attempting to prove actual damages. This they sought to do here by showing that they were placed in a

difficult competitive situation, and by showing a substantial reduction in net earnings following the defamatory statements. Defendants made no objection to the reception of such evidence and the court charged that this evidence could be considered. Defendants did not object to the charge on the ground that special damages had not been pleaded, but only on the ground that the proof was inadequate. Such a charge under these circumstances cannot be made the basis of a reversal of the judgment. If it was error to charge that lost profits could be recovered if the loss proximately resulted from the slander in the absence of a pleading to that effect, the error was waived by not being called to the court's attention at the trial, as required by Rule 51 of the Rules of Civil Procedure.*

We have carefully considered the other complaints as to the court's charge but find no error in them.

The judgment is AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit.

(Seal)

By Clara R. James, Deputy,
New Orleans, Louisiana.

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* "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects *and the grounds of his objection.*" (Emphasis added).

28 U.S.C.A., F.R.C.P., Rule 51.

APPENDIX "B"

JUDGMENT.

Extract from the Minutes of January 9, 1958.

TEXAS PLASTICS, INC., and FRED J. MEYER,

No. 16434. versus

ROTO-LITH, LTD., and HARRY BORAK.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Texas Plastics, Inc., and Fred J. Meyer, and the surety on the appeal bonds herein, The Seaboard Surety Company of New York, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

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IN THE

Supreme Court of the United States

October Term, 1957

TEXAS PLASTICS, INC. and FRED J. MEYER,

Petitioners,

—vs.—

ROTO-LITH, LTD. and HARRY BORAK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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McAllen, Texas
Of Counsel for Respondents

No. 907

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—VS.—

ROTO-LITH, LTD. and HARRY BORAK,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court is unreported but is set forth in R. 749-759. The opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court is reported in 250 F. (2d) 844.

Jurisdiction

The judgment of the Court of Appeals was entered on January 9th, 1958. No motion for rehearing was filed. The petition for Writ of Certiorari was filed April 9, 1958 and jurisdiction of this Court is invoked under 28 USC 1254 (1).

No Constitutional or Statutory Question Involved

This case does not involve a constitutional question, statute or regulation.

Questions Presented

Whether the form of Jury Verdict prepared by the trial court shall be disregarded when no objection was made either before or after submission, and the jury was fully charged with respect to use of the form.

Statement

The only question before this Court is the form of the jury verdict. This question, among many others, was passed upon by the District Court in overruling Petitioners' motion for new trial, and was clearly rejected as without merit by the United States Court of Appeals for the Fifth Circuit in their affirmance of the District Court's judgment.

The suit was brought by Roto-Lith, Ltd., a corporation and Harry Borak, its President against Texas Plastics, Inc., and its General Manager Fred J. Meyer, for actual and exemplary damages arising out of slander uttered by

the defendant Meyer in the scope of his employment as General Manager of the corporate defendant. Final judgment was rendered against the defendants and in favor of plaintiffs in the sum of $50,000.00.

Argument

Three issues were submitted to the jury after the Court's charge:

1. Actual Damages
2. Exemplary Damages
3. Defendants Verdict

No objection was made by the defendants to the forms prepared and submitted by the trial judge.[1] With regard to the forms, the Court charged the jury, again without objection from defendants, as follows:

> "Now for that reason, I have worded a form of verdict which you may or may not use, as it may suit your convenience; *first, in the event of a verdict*

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[1] This form, as completed by the jury, is here duplicated:

"VERDICT OF THE JURY.
Filed May 26, 1956.

We, the jury find for the plaintiff, Roto-Lith, Ltd., and against the defendants for $25,000.00 damages.

We further find for the plaintiffs and against the defendants, Texas Plastics, Inc., and/or Fred J. Meyer, exemplary damages in the sum of $50,000.00.

HUBERT K. PORTER,
Foreman.

or

We, the jury, find for the defendants.

.....,
Foreman."

for the plaintiffs, 'We, the jury, find for the plaintiff, Roto-Lith, Ltd., and against the defendants, for blank damage.' I mean there the nominal or actual damages that you may see fit to award. Now the second section, 'We further find *for the plaintiffs* and against the defendant Texas Plastics, Inc., and/or Fred J. Meyer, exemplary damages in the sum of blank dollars.' If you determine that exemplary damages should be awarded, then you will determine whether or not they should be awarded solely against the man making the statement or against Texas Plastics or against both, and you can strike out 'and/or' and strike out either one of those names, just whatever you find. I am just simply trying to assist you. The third form of a verdict is in the event of a verdict for the defendants, 'We, the jury, find for the defendants.'"

The jury entered its verdict on the form prepared by the trial judge. Final judgment was rendered against the defendants and in favor of plaintiffs in the sum of $50,000.00. No apportionment was made as between the plaintiffs, but this is not harmful to defendants, since the judgment against them can be wholly satisfied by payment to the plaintiffs jointly as in the form of the judgment.

The sufficiency of the verdict can scarcely be questioned when the Court charged the jury to use a given form in the event they made certain findings (no objection having been lodged against the charge or form), and the jury did exactly *as it was authorized to do*. If petitioners had desired a different form setting out the parties separately, they had ample opportunity to object to the form presented as well as to the charge. Petitioners are not now in position to say that the verdict means anything different

from what the Court charged the jury it would mean. The question is well resolved by the language of Judge Tuttle appearing at page 17 of Petitioners' brief where he said:

> *"In light of the charge to the jury quoted above, we have no doubt as to the correctness of this action by the trial court.* The court had specifically stated to the jury that if they found a verdict for both the plaintiffs they could use the written form prepared by the court provided: 'We, the jury, find for the plaintiff, Roto-Lith, Ltd.' *In the absence of any objection by the defendants* that there was an inconsistency in this form of verdict and in view of the fact that there was never any issue in the case which would have made a recovery for Borak stand on any different basis from a recovery for Roto-Lith, Ltd., *we see no reason why the jury's verdict should not be taken to mean exactly what the trial court said it did mean when he submitted the form to them for their action.* We therefore hold that the verdict of the jury was properly construed by the court to constitute a joint verdict in favor of the plaintiffs against the defendants."

A similar matter was passed upon in *Boice* v. *Bradley*, 92 F. Supp. 750 affirmed 194 F. (2d) 80, Writ denied 72 SC 1033 wherein the court said:

> "The jury was advised as to the limit it could go in assessing damages against the defendant. For the Court to say to a jury, this you can do, and then when the jury has acted, say that it acted wrongly, discredits the Court if the Court on that ground set aside the verdict."

The conclusion by the District Court and the Circuit Court that the jury found both plaintiffs entitled to actual

damages for the defendants' tort answers petitioners' contention with respect to exemplary damages, and therefore the cases cited by petitioner are distinct from the case at bar.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

JAMES C. ABBOTT
Counsel for Respondents